United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7165
75-7166

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,
against

UNITED BRANDS COMPANY,
Defendant-Appellee.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,
against

COMPANIA AGRICOLA DE GUATEMALA,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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Note on References

1. There are four volumes of the Appendix but five books - Volume II is divided into two books; plaintiff's exhibits are in Volume II(1) and Volume II(2) and are referenced by volume (not book) and page number, i.e. (II 727A); defendants'exhibits are in Volume III and are referenced by volume and page number, i.e. (III 920A); plaintiff's exhibits for identification are also contained in Volume III; Volume IV contains excerpts of the trial transcript as designated by defendants.

2. The District Court's findings are referred to by Volume I, page and then finding number, i.e. (I 255A, 6); the findings of fact from the prior New York State Court action "Ripley" are referred to by Volume I, page and then finding number which is always preceded by a letter, i.e. (I 125, B173).

3. Emphasis is supplied throughout unless otherwise indicated.

4. United Brands Company (hereafter "United" or "UB") was formerly named United Fruit Company and is sometimes intended to include its wholly owned subsidiary, Compania Agricola de Guatemala (hereafter "CAG" or "Agricola").

5. District Court is sometimes referred to as the Court.

6. Plaintiff's exhibits are PX; Defendants' exhibits are DX and trial transcript is TR.

7. DB is defendants' main brief below (Doc. No. 183).
DRES is defendants' response to plaintiff's answer below (Doc. No. 178)
REPPF is defendants' reply to plaintiff's proposed findings of fact and conclusions of law below (Doc. No.186).

Brief for Plaintiff-Appellant

Preliminary Statement

Appeal from decision of Hon. Murray I. Gurfein, Circuit Judge, Sitting by Designation, after trial on issue of liability alone, decision unreported; reproduced in the Appendix (I 193A-251A) findings of fact and conclusions of law (I 252A-369A), and appeal from decision (Gurfein, J.) granting defendants motion for partial summary judgment on the contract claim (I 43A-48A).

The Issues

1. Where defendant United Brands Company (hereafter "United"), a monopolist, and its wholly owned subsidiary, Compania Agricola de Guatemala (hereafter "CAG") threatened to terminate CAG's banana shipments over plaintiff's railroad unless it reduced the fair rate of $130 per car, and when plaintiff refused, defendant United (CAG) carried out their threat - was that not a *per se* violation of the antitrust laws, to wit, a monopolistic or concerted refusal to deal, a monopolistic or concerted boycott or abuse of monopoly power where a substantial motive of defendant United was to maintain its monopoly or foreclose competition, under the authority of *U.S.* v. *Griffith Amusement Co.*, 334 U.S. 100, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, *U.S.* v. *Aluminum Co. of America*, 148 F.2d 416 (C.A.2, L. Hand, J.), *Warner & Co.* v. *Black & Decker Mfg. Co.*, 277 F2d 787 (C.A.2) ?

2. Was it not error of law for the District Court to legally excuse defendant United's antitrust violations on the ground of a legitimate business reason (arguendo) under Fashion Originators Guild v. Trade Comm'n, 312 U.S. 457, 468, U.S. v. Aluminum Co. of America, supra, at 427 and Klor's, supra, at 212 ?

3. During the statutory recovery period, there were preferences in defendant United (CAG) on equipment, by contract and in practice, and preferences in rate and services at the Barrios pier, which defendant United coerced from plaintiff through its exercise of control and which gave United monopoly power to regulate the number of cars and other vital services its competitors received from plaintiff where plaintiff's railroad was the only practical means of transporting bananas from the farms to the port of export in Guatemala for shipment to the United States; were the above per se restraints,and thus violations of the antitrust laws under the authority of Swift & Co. v. U.S., 221 U.S. 1, 76, U.S. v. Reading Co., 253 U.S. 263, and Northern Pacific R.R.Co. v. United States, 356 U.S. 1, 5 ?

4. In this private damage suit for past wrongs under §7 of the Clayton Act, the Court held that the §7 violation is measured at the time of suit;* did it not commit error of law in effectively vitiating the four year statute of limitations of §4 of the Clayton Act ?

* original emphasis

5. Was IRCA's loss of revenue,as a result of CAG's curtailment and termination of its banana shipments over IRCA, injury to its business or property under §4 of the Clayton Act where plaintiff proved violations by defendant United, a monopolist, of the "antitrust laws of such a nature as to be likely to cause that type of loss" under Continental Ore Co. v. Union Carbide, 370 U.S. 690, 697, 704 and Bigelow v. R.K.O. Pictures, Inc., 327 U.S. 251, 264-5 and Zenith Corp. v. Hazeltine, 395 U.S. 100, 114, note 9 ?

6. Where defendant United, a monopolist, committed per se violations of the antitrust laws by using IRCA as its instrument to effectively restrict, foreclose and suppress the capacity of its competitors to ship bananas over plaintiff's railroad from western Guatemala for export to the United States and IRCA lost revenue as a result thereof, was plaintiff International Railways of Central America (hereafter "IRCA") injured in its business or property under §4 of the Clayton Act ?

7. Did not the 1948 contracts - when construed together, in light of Ripley and the fact that they were not the result of arms length bargaining but were imposed on IRCA the cestui by United its fiduciary during the period of United's control and domination over IRCA -

(a) impose on defendants an obligation which they breached, to ship bananas from western Guatemala until January 1, 1968, the termination date of the contracts ?

(b) require United to maintain a substantial volume of shipments from western Guatemala over IRCA, namely, the approximate amount shipped in 1948, since one of the agreements provided that it "is made at a time of great development in the banana transportation business on the west coast of Guatemala and shall extend until January 1, 1968, in furtherance of the desire of both parties to put this matter of banana transportation on the West Coast on a satisfactory basis for <u>each of them</u> for a period of years" ?

8. Where the District Court, in granting defendants partial summary judgment on contract claims,

(a) held that the parties agreed that the findings of fact from a prior state court action were binding here, was it error of law not to adhere to that ruling for purposes of the antitrust claims ?

(b) held that the findings from the prior state court action had a collateral estoppel effect as of December 31, <u>1960</u>, was it not error of law in holding that the collateral estoppel effect for purposes of the antitrust claim was only December 31, <u>1955</u> ?

<u>Statement of the Case</u>

<u>Nature of the Case, Course of Proceedings and Disposition in the Court Below</u>

This is an antitrust and contract action brought by IRCA against United, formerly named United Fruit Company, and CAG, a wholly owned subsidiary of United.

IRCA operated a railroad in Guatemala until the end of 1968. It defaulted on a $4,000,000 loan from the Guatemalan Government, secured by a mortgage on its Guatemalan properties; the Government instituted a foreclosure action, obtained a judgment thereunder and took over IRCA's Guatemalan properties and operations. Plaintiff claims this loss was caused by United's antitrust violations or in any event was subsequent evidence of plaintiff's permanent damage in 1964.

United produced and purchased bananas, and shipped them over IRCA from western Guatemala (sometimes called "Tiquisate") and eastern Guatemala (sometimes called "Bananera") to Puerto Barrios, the only deep water port in Guatemala, located on the east coast; most went to the United States and some were shipped to Europe. United had a monopoly over the shipment of bananas from Guatemala to the United States.

United through its exercise of control over IRCA in the pre-statutory period required IRCA to give United certain preferences in rates, equipment and other services that gave United monopoly power to determine who would ship bananas over IRCA, when and to what extent. Thus United's competitors could only operate in Guatemala at United's sufferance. Certain of these preferences continued during the recovery period and two, an equipment preference and a requirement that IRCA carry all bananas tendered by United, were in effect pursuant to a contractual requirement that did not terminate until January 1, 1968. In effect, United used IRCA as its tool to restrict, foreclose and suppress shipments by its competitors from Guatemala to the United States.

United acquired and held a controlling stock interest in IRCA for the double purpose of insuring favorable low rates and preferred services for its own shipments from IRCA and denying the same to its competitors. United sold its stock during the recovery period, to wit, January 1962. Plaintiff contends that the effects of that stock acquisition, through the contracts, continued at least until United's abandonment of Tiquisate in August 1964.

In a derivative action brought by minority stockholders of IRCA, in its behalf, against United, the New York State Court of Appeals, Ripley, et al. v. IRCA and United Fruit Co., 8 N.Y.2d 430, affirmed a judgment of the Appellate Division, 8 A.D.2d 310 (hereafter termed Ripley), whereunder IRCA received cash damages from United in excess of $9,000,000 (principal and interest), based on insufficient freight rates charged United by IRCA on United's shipments of bananas and imported supplies over IRCA. Said judgment also fixed rates for the future. The court found that United controlled and dominated IRCA at least from 1928 and stood in a fiduciary relationship to IRCA, and that the inadequate rates paid by United were a breach of its fiduciary duty.

Ripley ordered United to pay the public tariff rate of $130 per car on all of its banana shipments over IRCA from Tiquisate. After the opinion by the trial court in Ripley, United continuously threatend IRCA that it would not pay the $130 rate and would take its business elsewhere, by either finding an alternate mode of transportation or abandoning Tiquisate in favor of other United divisions. After Ripley was decided, United coupled its threats

with requests for a reduction in the line haul rate from $130 to $90 per car and when IRCA refused, it carried out its threat. At first United cut back its production at Tiquisate (commencing in the pre-statutory period) and then, it terminated all its shipments. In addition, United deliberately disposed of Tiquisate by piecemeal sale of its assets instead of on a going concern basis, in order to foreclose competition and to maintain its monopoly in Guatemala, Central America and the United States.

All of the above were violations of the antitrust laws, §§1 and 2 of the Sherman Act and §7 of the Clayton Act.

Plaintiff also claimed a breach of a requirements contract that did not terminate until January 1, 1968.

The District Court, Gurfein, J., granted defendants partial summary judgment on the contract issue and held that United had no obligation to ship over IRCA after January 1, 1963 and no obligation to ship any specific amount of bananas per year. After trial, the Court held, on the contract claim, that in effect there was no restriction that was tantamount to an abandonment up through January 1, 1963. The District Court dismissed the antitrust case, which was tried on liability only, essentially on the ground that United had legitimate business motives in abandoning Tiquisate. This appeal followed. We submit the decision below is erroneous as a matter of law; _inter alia_, the learned District Court overlooked the classic statement by this Court in _U.S._ v. _Aluminum Co. of America_, _supra_, at 432, that "no monopolist monopolizes unconscious of what he is doing."

Material Facts

A convenient summary of the early basic facts may be taken from Friendly, J.'s opinion on the prior appeal, supra, (I 6A-8A):

> "IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorpoation in 1904, IRCA's fortunes were closely linked to UF's banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.
>
> "In 1928 a syndicate including UF and banking firms purchased the interest of IRCA's dominant shareholder, Minor C. Keith, this making UF, with 71,000 shares of common stock, the largest single shareholder. The stock purchased by the syndicate was placed in a voting trust under which UF, through a trust company as its agent, nominated two of the five trustees. In fact UF took over control of IRCA, although its stock ownership was concealed. By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania

"Agricola de Guatemala, S.A. (Agricola), a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock at a low price and the voting trust was dissolved. UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

"From this time UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as 'special advisor' to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.

"As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a profit. For bananas from eastern Guatemala, UF was charged 11 1/2 or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder.

"In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949. A year later the Appellate Division sustained the complaint except for such portions as related to matters occurring before February 4, 1943, which were held to be barred by the six-year statute of limitations. Ripley v. International Railways of Central America, 276 App. Div. 1006, 95 N.Y.S.2d 871 (1st Dept. 1950). After service of an amended complaint, denial of a motion challenging its sufficiency and extensive discovery, trial was begun in 1953 before Mr. Justice Hammer and, after his retirement, was continued before him as a referee.

"In a long report and decision, filed in June, 1957, the referee concluded that plaintiffs had established a breach of fiduciary duty by UF. He fixed rates for the carriage of the bulk of UF's traffic at considerably more than what IRCA had collected but less than those charged to independents.* Although at the trial IRCA had opposed the plaintiffs

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* "For west coast bananas he directed that the $75 per car rate voluntarily made effective in January, 1948 should be applied retroactively to January 1, 1946, that the rate for 1948 should be $80, and that this should rise $5 annually through 1955. For east coast bananas he directed that the 15 1/3 cent per stem rate which had applied from 1920 to 1930 should be restored from 1943 through 1955. For import traffic he directed an increase of 10% per car for 1947 and for each year thereafter through 1955. As to other items, he found plaintiffs had not adequately proved damages. He expressed the opinion that 'equity and fair dealing indicate, and no doubt would require, similar annual rateable increases' for the cross-country traffic 'until the rates equal those fixed for the general (footnote continued on next page)

"and supported UF, because of fear that judgment for the plaintiffs might enable UF to terminate the complex of contracts executed in 1936, the referee's conclusion as to the severability of the rate arrangements led it to join plaintiffs in appealing on the ground that the award of damages was inadequate. The Appellate Division rejected this argument as it did the many grounds urged by UF for reversing the award to IRCA, Ripley v. International Railways of Central America, 8 A.D.2d 310, 188 N.Y.S.2d 62 (1st Dept. 1959), and the Court of Appeals affirmed, 8 N.Y.2d 430, 209 N.Y.S.2d 289, 171 N.E.2d 443 (1960). On March 1, 1961, the Supreme Court for New York County entered a supplemental judgment assessing damages for 1956-60 in the sum of $3,309,670.39, with interest.:

The District Court admitted in evidence certain findings of fact in Ripley (I 122A-145A) and held that they had a collateral estoppel effect as of December 31, 1955. (I 246A, ftn. 1). Ripley found that at all times relevant to this [Ripley] case, IRCA has been under the practical control of United, and United exercised effective control and domination over the direction, management and operation of IRCA (I 122A, B3). The IRCA Board of Directors and officers looked to the United Special Adviser for decision on all matters of railroad operation, both as to policy and detail (I 126A, B186).

The very crux of United's antitrust violations through

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* (footnote continued from preceding page) public, (or so-called independent), shippers." The judgment entered December 19, 1957, translated these figures into dollar amounts aggregating $4,531,055.38, including interest, established rates from January 1, 1956, in accordance with the above, and contained an appropriate reservation of jurisdiction for the future.

December 31, 1955, at least, was its coercion of IRCA, effected through United control and domination over IRCA, United's continued ownership of shares in IRCA, the contracts extracted by United from IRCA, the discriminatory rate and service structure, and United's monopoly over the production and shipment of Guatemalan bananas to the United States. The Court, in effect, implicitly assumed these antitrust violations in the period through December 31, 1955. In fact, it assumed the United monopoly continued during the statutory period (I 224A, 215A).

1. United's Threats, Carried Out, To Cutback And Abandon Tiquisate Unless IRCA Reduced The Rate Of $130 Per Car Held To Be Fair In Ripley. The Court found that United made threats to IRCA, to wit, "Before and after February 16, 1961 United officials informed IRCA that unless the Ripley judgment required rate of $130 per banana carload was reduced to $90, the Tiquisate operations might have to be liquidated. IRCA refused to reduce the $130 Ripley-decreed rate" (I 325A, 177-178) and "IRCA's refusal to lower the rate was in the face of clear intimations by UF, as plaintiff has shown, that, as an anternative, the defendants might have to discontinue the Tiquisate operation" (I 217A).

After the decision by Referee E. L. Hammer in Ripley, United commenced its threats against IRCA. In July, 1957 a United official and IRCA director, Mr. James McGovern*, warned IRCA

* McGovern was the General Attorney of United until his sudden death on February 16, 1961; between January 1, 1956 and 1959, he was also a director of IRCA, and from 1959 to February 16, 1961 the Chairman of the IRCA Board.

on behalf of United that United would "continue to fight this case even if they have to go to the Guatemala courts in order to recover what they might have to pay under the judgment of the New York Court * * * He stated most emphatically that United Fruit was not interested in shipping bananas at the regular published tariffs ..." (II 452A-5A). In that same month United, in a letter to IRCA, stated that it considered the Ripley decision "completely unfounded in fact and unsound as a matter of law"; that it "did not wish to continue to do business of a substantial volume under contracts which the other contracting party finds unsatisfactory"; that it requested IRCA to call a special stockholders meeting for the purpose of ratifying the existing contracts and if the stockholders, without United voting, fail to ratify the contracts, then the stockholders should authorize their cancellation because at the rates ordered by Referee Hammer, United wants to cancel all the contracts between United, CAG and IRCA, and take back its locomotives and banana cars, and that United and CAG would no longer be required to use IRCA if they decided to use their own or other transportation facilities (II 456A-7A). United also warned in that connection that, if not resolved, the situation would become "more aggravating" as the litigation continued (II 457A). IRCA, on advice of its counsel, refused to call such a meeting.

Despite Referee Hammer's admonition in his supplemental opinion of December 18, 1957 that: "Any antagonism or attitude of reprisal against IRCA as retaliation against minority stockholders that may be engendered is not only unreasonable and

unwarranted, but also is further demonstration of continued inequity and unfairness" (Doc. No. 74), United continued to manifest its attitude of reprisal. United, in the Appellate Division and the New York Court of Appeals, again warned that it would greatly restrict or close down its Tiquisate development rather than pay the rates set by the Referee (II 869A-70A).* In the Court of Appeals in Ripley (United's Main Brief, p.134), United set forth the blueprint which later became policy, to wit, if IRCA insisted on the $130, United would take its business elsewhere, either by a different means of transportation or by abandoning the West Coast of Guatemala in favor of some other area. The full statement is:

> "Any attempt to 'hold up' United by insisting upon anything like the exhorbitant figures now retroactively inserted in the agreements would simply have meant that United would have taken its business elsewhere, either by setting up its own transportation system or by abandoning the West Coast of Guatemala in favor of some other area."

That attitude of United carried over to United's new President, Mr. Thomas Sunderland, who took office in November 1959. United further warned in the Court of Appeals in 1960 that an affirmance of the Ripley decision awarding IRCA a cash judgment would "break the whole relationship between" IRCA and United and United "doesn't have to grow bananas" at Tiquisate, and it may "let the bananas rot on the ground" rather than ship at the rates set in the judgment (II 864A, 862A).

In September 1960, United and CAG acknowledged the fact that future banana shipments from CAG on the west coast

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* See United's concession Doc. No.73, TR 79.

of Guatemala over IRCA to Barrios were vital to the survival of IRCA since they represented the single greatest source of revenue for IRCA (II 379A). Sunderland asked his counsel what United could do in the courts of Guatemala in the event the decision was against United and to consider "complete preparation for such litigation" (I 325A, 180). Then after the decision by the Court of Appeals, Sunderland asked "Can we close down Tiquisate without liability to minority UF Co. stockholders" (II 496A); on February 6, 1961 he stated that a long range plan should be developed re Tiquisate in view of the Ripley decision and a decision should be reached soon as to what "we" plan to do - This should not be held back pending some hoped for assurance "that rail rates will be adjusted to enable us to continue this division" (II 382A).

Sunderland stated (III 1024A) that a United official was working on a financial analysis of the two Guatemala divisions "based on the new schedule of rates imposed on us by the New York courts in the Ripley case, [and] consideration of a possible new port on the Tiquisate side so that fruit will not have to be shipped by railroad when the current contracts expire ...". Sunderland referred to the rate United set for independents in 1939, but which was now being applied to United, as "confiscatory" (TR 931). Other top United officials spoke in the same vein: "We have had it as far as Guatemala is concerned, thanks to Judge Hammer, the New York courts, Berner, Sullivan and Cromwell, et al" (PX 598); "it is necessary to

get out from under" the _Ripley_ judgment (PX 19); United "can't live forever with Ripley decision" (II 473A).

Even though United, pursuant to its control and domination of IRCA, had, since 1939, required IRCA to charge $130 to United's competitors and had required it to give United other service preferences over United's competitors in the shipment of bananas from the West Coast of Guatemala to Barrios, United now took the inconsistent position that it could not afford to pay the $130 rate and it was confiscatory.

A comparison of United's attitude as to Tiquisate and Honduras reveals Sunderland's animosity to IRCA as a result of _Ripley_. United decided not to commit any further funds to maintain production at economic levels at Tiquisate and Honduras in 1960 (II 374A). After _Ripley_ was decided by the New York Court of Appeals, on February 6, 1961, re Honduras, Sunderland said (III 1023A): "The advent of _Variety_ bananas and _boxing_ has of course changed the picture considerably and I wonder if you have been able to project any possibility of an economic or profitable future for that division after new programs are established." Instead of showing that same constructive attitude to Tiquisate, Sunderland on that same day was considering alternate transportation arrangements "so that fruit will _not_ have to be shipped by the railroad when the current contracts expire ..." (III 1024A).

Sunderland thus viewed the Court of Appeals decision in _Ripley_ affirming the public rate as the green light for

carrying out the threat made in the New York Court of Appeals, to wit, United would take its business elsewhere after December 31, 1962 either by an alternate means of transportation or by abandonment of Tiquisate in favor of some other area unless IRCA responded to the threat by reducing the $130 fair rate ordered in Ripley.

The Court found that United explored "alternative methods of transporting bananas to ports" and that "'rail transport was the indicated method economically and otherwise' and 'they needed the bananas for sale on the East Coast'" (I 318A, 164; I 326A-7A, 184-5); "the only realistic means of transporting fruit from western Guatemala, either on a stem basis or boxed, through the port of Barrios, is by IRCA; it was out of the question to consider trucking fruit from Tiquisate to Barrios" (I 318A, 165). Thus, since an alternate means of transportation was "uneconomic and unacceptable" to United, then pursuant to its statement to the New York Court of Appeals United would be "abandoning the West Coast of Guatemala in favor of some other area" unless the $130 fair rate was reduced.

But Sunderland could not abandon without any reason, otherwise United would be subject to a United minority stockholder action. Under the Ripley judgment, United had the right to apply to the New York State Supreme Court for a reduction in the $130 rate by showing a change in economic circumstances

(II 857A, ¶9); it never did even though Sunderland considered it (II 496A). Sunderland's strategy was to demand a reduction in IRCA's rates from $130 and if it refused, then to abandon Tiquisate. United would build a "written file" to show this course of conduct as a justification for the abandonment, to wit, IRCA's refusal to grant a reduction in rate (III 1212A).

In September 1962, a vice president of United stated to IRCA's representatives that "large capital expenditures ... necessary for boxing plants ... would not be made and <u>production</u> of bananas in Tiquisate would be <u>discontinued</u> unless a satisfactory rate was agreed upon with IRCA." (II 513A). At a January 1963 meeting between officials of IRCA and United, Mr. John Fox, executive vice president of United, threatened that "due to the cost of this [banana] freight ... [United] was facing the possibility of having to close down the division unless some remedy could be found." (III 1276A) In February 1963, Sunderland stated to a representative of AID who was investigating a possible loan to IRCA for dieselization

> "It's got to take a reduction in rates or we can't live with it ... Well, we just have to let the division <u>just kinda gradually peter out.</u> In other words, we just couldn't replant. <u>We wouldn't go to the expense of tearing out anything that is there</u>, but - no - <u>there's got to be a reduction in rates, or we just can't live with it.</u>" (II 450A)

Thus Mr. Sunderland was clear on the alternatives: a reduction in rates or Tiquisate shuts down.

In May 1963, Sunderland made it crystal clear to other United officials that unless IRCA quoted United "some new and competitive rates from Tiquisate to Puerto Barrios", it would "discontinue banana planting in Tiquisate" (III 1212A). Implicit in United's threat to abandon Tiquisate, was the assumption that if IRCA did lower its rate to $90 per car, then United would stay and continue its operations there. In fact, Sunderland in 1963 stated that if IRCA quotes new lower rates "that allow us to extend the life of our division in Tiquisate, then that is a very good development in and of itself" (III 1212A). Thus the implicit assumption in the threat of continuing Tiquisate if the rate is lowered is totally inconsistent with the alleged legitimate business motives of defendants in closing Tiquisate for reasons other than rate.

Mr. Roy Chalk, Chairman of IRCA's Board, by letter dated April 18, 1963 requested a further meeting for the purpose of discussing United's movement of bananas from Tiquisate (III 1275A). United advised IRCA that CAG was going to make experimental shipments of bananas by truck from Tiquisate to the Mexican border and then via the Mexican railroad into the United States (DX 493, p.2). By letter of May 29, 1963, IRCA registered its objection to the proposal and asserted that CAG was obligated to make all shipments exclusively over IRCA to January 1, 1968 at least. IRCA concluded by stating that "IRCA prefers - and indeed is anxious - to maintain the

best relationship possible with United Fruit and Compania Agricola" (II 448A). The trial truck shipments proved unsatisfactory to CAG and were never implemented commercially. United, in response, asserted that its obligation expired on January 1, 1963 (III 1214A-5A).

United never followed up on Chalk's April 18th request for a meeting, and Harold Haase, President of IRCA, by letter dated July 27th (II 388A) also called for a review of United's plans regarding future banana production and shipments over the IRCA. Haase stated: "We have attempted recently but without success to continue discussions on this and related transportation matters with certain of your officials." By letter of August 1, 1963 (III 1278A), Chalk again sought a meeting with United. This third request from IRCA was finally honored and the meeting took place on August 29, 1963 (II 709A). At that meeting, after it became clear to Chalk that unless IRCA reduced the Ripley rate United would in fact pull out of Tiquisate, Chalk raised the possibility of the purchase by him and some of his associates of Tiquisate in order to protect IRCA's interests and United gave him a copy of the Consent Decree (II 710A).

2. United Terminated Negotiations With Chalk.

By letter of September 3, 1963, Chalk advised Fox of United that he was particularly interested in the Consent Decree and the creation of a new company to take over the production of

9,000,000 stems of bananas and that my associates in another company "would be very interested in the purchase of the entire Guatemala installation presently operated by United Fruit Company pursuant to the decree either under Plan B or Plan C." (II 389A) During this period, in response to Fox's statement that United was planning to abandon Tiquisate, Chalk stated to Fox that that would violate the agreement and asked that United "either sell the lands to my organization or to independents who would continue to produce the bananas, so that we would not be deprived of the traffic" (II 882A). The idea of fitting a Tiquisate transfer under the consent decree was to interest United in "killing two birds with one stone", to wit, dispose of Tiquisate and at the same time meet United's obligation under the divestiture provision of the consent decree. Chalk believed that compliance with the consent decree would be an added inducement for United to sell Tiquisate as a going concern to him, so that IRCA would not be deprived of that vital banana traffic.

In early September 1963 the management of CAG* advised the President of IRCA that there was no program for additional banana planting at Tiquisate but if the $130 per car rail rate on banana shipments from Tiquisate to Barrios was reduced to $90, then perhaps, something could be done about new plantings at Tiquisate (II 391A, ¶3).

* The United and CAG manager in Guatemala had previously stated that "we are a monopoly holding the best lands on the Atlantic and Pacific Coasts" (PX 23, p.3, 2nd ¶).

United, not having obtained a reduction in the Ripley rate from IRCA, proceeded to carry out its threat of shutting down Tiquisate. The management of United on September 18, 1963 decided to request authority from its Board of Directors to sell or transfer all of the remaining 30,400 acres in the Tiquisate Division which it did not then have authority to sell (II 439A). It is noteworthy that said document is silent on attempting to sell Tiquisate as a going concern to Chalk or others or even consideration of such alternative. On September 23, 1963 United's and CAG's boards authorized the closing down of Tiquisate and selling off the properties (II 392A, 397A). Likewise, there was no mention in the minutes of selling Tiquisate as a going concern.

At a meeting on September 30, 1963 with representatives of United, Chalk expressed interest in acquiring Guatemala production and transportation assets of United or CAG including banana lands and other essential assets reasonably calculated to be capable of exporting annually to the United States approximately 9,000,000 stems of bananas. Chalk stated "'we' were 'a natural customer for the Guatemala properties' if we were interested -- and we are interested.' ... Mr. Chalk explained that 'we need the freight business' and also look forward to a profit on bananas. Given the time, it was his opinion that the combined production of the two divisions could be brought up to 9 million stems." (III 1219A) There

followed a general discussion of shipping, marketing, price, and Department of Justice approval.

On November 1, 1963 United advised Chalk in writing that it was in a position to consider the sale only of the production and transportation assets of CAG located in the vicinity of Tiquisate on the west coast of Guatemala. United stated that IRCA's freight rates had reached an unreasonable level and further advised that "the increased freight and the extended time required to transport bananas from Tiquisate to Puerto Barrios are two of the important factors which our Board of Directors considered in their recent decision to invest no further funds in banana operations on the West Coast of Guatemala" (II 398A). When United required IRCA to charge its competitors $130 per car, however, it did not consider the charge unreasonable.

United further advised Chalk "from the point of view of delivery of bananas to the U.S. market, these Guatemalan properties have one of the best locations in the world and we believe you are in a unique position to capitalize on this." United further advised that the total area of 30,372 acres is available for planting with a low-growing variety (i.e. wind-resistant) banana resistant to Panama disease and will produce more tons per acre than the tall Gros Michel banana. United further stated that in its judgment the Tiquisate lands were capable of producing variety bananas in a number sufficient to to enable the subsidiary to export 9,000,000 stems annually

to the United States and that number "could be produced annually in a few years with an additional investment of approximately $9,000,000 based on present day costs ... in addition, you will be acquiring one of the most fertile banana areas in the world." United then stated that it would consider making available proper personnel, chartering shipping at competitive rates and helping with distribution facilities (II 399A), contra the Court (I 350A-1A, 237(a)).

United enclosed a breakdown of the production and transportation assets of CAG stating their approximate cost ($23,000,000) and also the amount United expected to realize from a sale on a strictly salvage basis ($6,500,000). United stated that the value of the division as a continuing and going concern to someone interested in producing and exporting bananas would be substantially over the salvage figure" (I 349A, 235). United states it stopped all land sales activity at Tiquisate to wait for an answer to its letter of November 1st (II 407A).

In a telephone conversation on November 18, 1963 with Fox (II 426A), Chalk stated that he was still interested in acquiring the Tiquisate Division on the west coast of Guatemala even though United was no longer interested in selling its Bananera (East Coast) Division; United, in its December 23, 1963 letter to Chalk (II 407A), misstated the substance of Chalk's conversation with Fox on November 18, 1963, regarding Chalk's interest in acquiring the Tiquisate division (Cf. II 426A with II 407A). Fox prepared a memo of his telephone conversation

with Chalk on November 18, 1963, in which he stated that Chalk "reiterated his interest in purchasing the land at Tiquisate ..." and Fox agreed "to furnish him with prices and terms that we are currently asking for the land alone as soon as possible. He [Chalk] further reiterated that his interest was confined to Guatemala ... because he already has such an important stake in the IRCA in Guatemala" (II 426A). United, after that November 18th telephone conversation, did not forward the land prices to Chalk as Fox undertook to do. After determining that there were "no concrete commitments" outstanding for the sale of the 30,000 acres at Tiquisate (II 530A) and at first advising CAG not to make any commitments (II 529A), United then, without warning to Chalk, proceeded to commit the land further (PX 787).

The manager of CAG later stated that at the time he did not recall a commitment of approximately 3,500 acres that Mr. Bump had made sometime before for the Pacaya, El Cedio and La Ceiba Farms (PX 1010, 12/4/63). Said so-called commitment was not a commitment but merely a right of first refusal on said 3,500 acres given to R.A. Holcombe, the Tropical Manager of United (and his syndicate) and the brother of T.A. Holcombe (who requested a first refusal on 2,175 additional acres) (II 808A-810A). In fact, Mr. Fox on October 17, 1963 stated "much of this land is still occupied by banana cultivations and, in the ordinary course of events, would not be available for sale until about the middle of next year" (II 711A).

On December 19, 1963, Chalk and George Blow (counsel representing United) met with representatives of the Justice Department to explore the acceptance by the Justice Department of a sale of Tiquisate by United to Chalk*, and credit for partial or complete compliance with the Consent Decree. At that meeting, as reported by a United representative, "Chalk stated that the banana business was very important to IRCA; that he had recently received word that United intended to give up its banana operations on the west coast of Guatemala; and that he was interested in acquiring United's assets there. He explained that while 'they might not be able to make a profit, we have a railroad.' Furthermore, 'to give up 2,500 employees is a serious thing politically.' He continued: 'There is an answer. Don't terminate. I am ready, able and willing to do business'" (II 420A). Chalk referred to the fact that United in its November letter was prepared to consider the sale only of its assets on the west coast and stated "'That's all right with me too' 'half a loaf is better than none and that is where I have the railroad.'" Chalk stated bananas now account for 20% of his freight and with an increase in production on the west coast, this percentage could double. Chalk stated "he would be a 'strong competitor' in the banana business." (II 421A) Chalk gave the Department of Justice "a rather convincing picture of impending hard bargaining on price in the event the proposed sale had the approval of the Department of Justice as compliance

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* When we use the term "sale to Chalk" we include a sale to Transportation Corporation of America (TCA).

or partial compliance" with the Consent Decree (II 424A). "As Chalk presented the proposal, it was clear that he initiated negotiations and not United." (II 424A-5A memo by Blow) After the conference, Blow advised United that Chalk "is very anxious to acquire United's assets on the west coast of Guatemala" (II 419A).

Blow stated "[Chalk] emphasized his opinion that the proposed sale of these assets to him is (1) in his interest; (2) in United's interest; and (3) in the interest of our government and that of Guatemala" (II 419A). At that meeting the Justice Department expressed particular concern "as to whether United would retain any interest at all in banana operations on the west coast? Chalk replied there would be a complete separation." (II 423A) Blow then stated the only exception would be that "United would consider making available managerial or other personnel Chalk might require in order to develop the division's potential production" (II 423A). Chalk expressed his understanding that the present production in Tiquisate, between 2 and 3 million stems, could easily "be stepped up to the full 9 million stems. Kilcarr [Justice] indicated some concern that this would be largely if not wholly in varieties" (II 423A-4A). Had United made a full statement of its shift to full scale production of the Valery, as the evidence demonstrates, it is fair to assume that United, having sold its own Board of Directors on the Valery, could have persuaded the Department of Justice. In any event, Justice

Department approval was only necessary if United wanted credit toward compliance with the consent decree, but even without Department approval, there was no restriction whatever on United's making an agreement with Chalk or with any other purchaser for the transfer of Tiquisate as a going concern.

Sunderland, Fox and Chalk had a telephone conversation on December 23, 1963 (recorded by United, II 534A), after Chalk's meeting at the Department of Justice. Chalk was told that United only had 10,700 acres of land available and uncommitted (II 534A-5A). Chalk stated: "Your attorney [United's counsel] indicated to me when I dropped him off at his office that he was quite impressed with the possibility there of our getting something that would be favorable for you and favorable for me." (II 537A) To which, Fox replied (II 537A):

> "I'm pretty sure that was his reaction because he did tell me that too. He was plenty surprised to see the warmth of the reception we got."

Sunderland stated that they could still put together a fine banana division at Tiquisate*, part owned by Chalk and part by associate producers (II 538A). Chalk stated he was interested in it; his greatest interest related to a cross section of United and to satisfying the 9,000,000 stem requirement (II 539A), Chalk stated that IRCA was seriously interested in going forward and still was.

United was interested in seeing if the Justice

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* On December 20, 1963, the manager of CAG advised Boston that he had committed the balance of the available land (PX 787), but apparently Sunderland and Fox did not consider such commitments as legally binding in light of what they told Chalk on December 23.

Department would give credit for the number of stems of production they could put together in Tiquisate, and if the Justice Department was interested, then "we'll go right to work on it and we can put together a fine division for you." (II 543A) Sunderland stated we can put together 20,000 or 30,000 acres of the "best banana land" and "You can have just as big a division as you want. There's all the land in the world there in Tiquisate ..." (II 544A). Again, later in that conversation, Sunderland stated (id., p.11): "The thing that's important is to get from the Department of Justice a clearance saying that if we can put together X amount of stems of production there that will count as partial or complete compliance with the decree" (II 544A).

This was repeated again (II 545A, 550A, 552A, 556A). Chalk asked for a right of first refusal on the last 10,000 acres and was refused (II 547A). Chalk complained that he never got any land and 20,000 acres had been sold out from under him while others were able to purchase (II 547A). Chalk said, the Department knows he would "constitute extra special competition" (II 556A). United stated it could even put together 30,000 acres to be owned outright, by re-acquiring some of the land (II 559A). They told Chalk he could produce about four million stems on 10,000 acres in the new banana, and "all of this would produce beautifully in the new banana," what's in there now "is a ratty production" and "we never did try to convert this division over to the new banana" (II 560A-1A). The parties agreed that United would immediately present Chalk

with a written plan for ownership production of 4,500,000 stems and 4,500,000 in associate producers in a way that would comply with the consent decree and Chalk would then push hard for it at the Department of Justice (II 561A-6A).

United, on that same day, December 23, 1963, sent Chalk a letter (II 406A) the subject of which was "setting up of a banana division in the Tiquisate area of Guatemala to effect partial or complete compliance with our Consent Decree." United went on to state:

> "The passage of time and the completion of many sales have made the problem more difficult -- but we believe it can still be accomplished in a reasonable period of time and at reasonable prices." (II 407A)
>
> * * *
>
> "As soon as the Department of Justice has indicated a willingness to consider a banana division in the Tiquisate area in compliance with the Decree and has indicated a willingness to count Associate Producer acreage in totalling up the amount of production for which we get credit for compliance under the Decree, <u>then we can negotiate appropriate arrangements with you. Obviously, you would not be committed unless and until you were satisfied with the package that could be assembled</u>" (II 408A)

United further stated that "We have been averaging about $100 per acre for the good banana lands which we have been selling" (II 408A) and we estimate you could reacquire from 15,000 to 30,000 acres at an average premium of $25 per acre. United then stated:

> "This would give you top banana lands at a reasonable price -- particularly when you realize that this <u>Company has invested more than $1,000 per acre</u> for much of this property to develop it into a banana division. The prompt acquisition of acreage at this time would give you the benefit of a substantial portion of this investment on our part" (II 408A).

In order to justify putting its organization to work (to develop a plan) United wanted to know:

> "(1) how much property you want to own outright; (2) how much property you want on an Associate Producer basis; (3) will the Department of Justice give us credit for partial compliance under the Decree for putting together a banana division that will produce something less than nine million stems; and (4) whether the Department will give credit for complete compliance if we can put together a package involving a full nine million stems of production (and if so, what proportion can be in owned acreage and what proportion in Associate Producer acreage).
>
> "Please let me know if you are interested in pursuing this whole matter, after which we can firm up the necessary details. As you know, we will be continuing with our sales of property pending further word from you" (II 408A).

Clearly, as of December 23, 1963 Sunderland and Fox appeared interested in selling to Chalk provided they could get partial or complete credit for compliance with the Consent Decree. United only asked Chalk if he was interested in pursuing the matter, how much property he wanted to own outright and how much on an associate producer basis, "after which we can firm up the necessary details." Chalk responded to United by letter dated December 30, 1963 (II 409A) that on the assumption it would take 30.000 acres to produce 9,000,000 stems, we would want to own 50% of the land (15,000 acres) and have 50% (15,000 acres) as associate producers (I 351A-2A, 238). Chalk stated assuming United still has 10,000 acres available for sale at $100 per acre

[which is the price Sunderland stated United was averaging] "we would be willing to purchase such land from you upon the same terms as you have sold similar land to others." Chalk further advised that we would be willing to purchase 4,000 to 5,000 acres at the price purchasers paid United "plus a reasonable profit" (II 409A). Chalk then stated that we would be pleased to enter into an associate producer program on another 15,000 acres "capable of producing that additional 4,500,000 stems ... We are particularly interested in stimulating the Guatemalan economy rather than cutting back its potential which could result from curtailing banana production in Tiquisate" (II 409A-10A). With reference to the Consent Decree, Chalk stated: "we can assure you that our contemplated banana operation will be an <u>aggressive</u> one and you may rest assured that we will be a <u>very formidable</u> and <u>active competitor</u> to bring into reality the objective underlying" the Consent Decree (I 351A-2A, 238). Chalk then stated "it will be necessary for you to turn over to us simultaneously all of the facilities stated, intended and implied under Section 8" of the Decree, with specific reference to the facilities described in Sections A, B, and C (II 410A).

Section B of Section 8 stated: "United shall <u>sell</u> to an Eligible Person ... production and transportation assets ... including producing banana lands or producing

banana lands and banana purchase arrangements, ships and other essential accessory assets reasonably calculated to be capable of importing annually" into the United States 9,000,000 stems of bananas per year (III 1232A). Thus there is nothing in Chalk's letter which indicates he was attempting to obtain assets "for nothing" but instead he referred to those parts of the Consent Decree which indicated a sale of assets by United. The Court committed clear error in stating (I 226A) that Chalk was trying to "get the equipment and plant for nothing* and buy it as a divestiture under the consent decree which would also require UF to sell him the appurtenances needed for a going business including a steamship fleet worth $5 million." Certainly there was no doubt that Chalk was trying to buy it as a divestiture under the Consent Decree, so he would have a going banana operation, that was the expressed intent of the Consent Decree. There is no evidence that United construed Chalk's proposal with respect to facilities as the District Court held, to wit, "for nothing". In fact, if United had sincerely adopted such a construction in 1964, it would have been easy to reject the Chalk offer on that ground and leave it open to Chalk to react but it

* Arguendo, in its letter of December 23, 1963 (II 408A), United indicated that Chalk would be acquiring something over and above the land at $100 an acre when it said: "This would give you top lands at a reasonable price -- particularly when you realize that this company has invested more than $1000 per acre for much of this property to develop it into a banana division."

did not. Moreover, on December 19, 1963 Chalk advised the Department of Justice that "he was 'still waiting' for United's asking price" for the assets of CAG (II 424A).

Chalk closed his December 30th letter (II 410A) by stating:

> "Pending negotiations of the deal upon mutually satisfactory terms, it would be appreciated if you would keep the necessary property available to us for a reasonable period of time to conclude this transaction."

United took Chalk's letter seriously; it didn't question his financial capability. It called a meeting of seventeen of its top personnel (including the President, Executive Vice President and the manager of its tropical operations) for Boston on January 9, 1964. The only contemporaneous company document of what transpired at that critical meeting recorded the time, place and date, the "Re: Consent Decree Problems", the names of all those present at that meeting, and the following handwritten statement by Sunderland "All present were in favor of not selling to Roy Chalk" (II 411A). We are now told by United that the only contemporaneous company record of that meeting was Sunderland's lone, one sentence note. Obviously, such an important meeting was memorialized by United, but was never produced. It is totally unfair for United to fill the gap with all of Sunderland's ipse dixit as to what transpired at that meeting and the Court committed reversible error in accepting his testimony (I 354A-5A, 241(b)-(i); I 357A, 243) which was inconsistent with the other documentary evidence (II 534A, 406A, 409A, III 1175A, II 412A).

Thus it was United that decided not to sell to Chalk and there was no reason assigned in that document - certainly United raised no question - as to the type of proposal Chalk made since United had only asked "if you are interested in pursuing this whole matter, after which we can firm up the necessary details" (II 408A). But it was United who decided <u>not</u> to "firm up the necessary details" (II 408A) by its decision not to sell to Chalk (II 411A).

In fact, United conceded below* that it decided "to terminate the Chalk discussions ..." as we clearly proved.

The only other document explaining what transpired at the January 9, 1964 meeting was prepared by Blow, United's outside counsel, after the commencement of the litigation, to wit, on March 16, 1965 (III 1175A). That document totally supports plaintiff's position. It shows that United's meeting on January 9, 1964 was called for the purpose of considering Chalk's letter of December 30, 1963 (III 1176A). Moreover, one of the alternatives considered at that meeting was to "enter into negotiations with Mr. Chalk looking forward to the sale to him of assets. ..." (III 1177A)

United counsel's memo of the January 9th, 1964 meeting of United shows that there were three alternatives presented: (1) United could repurchase acreage and cancel outstanding commitments in Tiquisate (2) United

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could advise Chalk that there were not sufficient assets remaining in Tiquisate to make it practical to proceed along the lines of their letter of December 23, 1963 and (3) United could enter into negotiations with Chalk to sell him assets (or an interest in a new company) in Bananera as well as in Tiquisate. Of the three alternatives, No.2 was a cover-up for a turndown to Chalk, since No. 1 and 3 were real alternatives; United chose No.2, the cover-up, in support of its turndown to Chalk and added to it that "the Company cannot renege on our commitments to Guatemalans" (II 412A). Those so-called commitments didn't bother Sunderland and Fox in the December 23rd telephone conversation with Chalk.

The Blow memo also shows that one of the critical reasons why United did not further negotiate with Chalk was its desire to buy the time remaining to it, to wit, to 1966, before submitting a plan for creating a competitor in compliance with the consent judgment (III 1179A)

> "Since United's planting, boxing and marketing operations were in a period of transition, United should take advantage of the period remaining to it [namely, to 1966] to prepare and submit a plan of compliance with the Consent Judgment."

Put simply, United did not want to turn the banana production capability at Tiquisate over to competition in 1964. United knew, if it sold to Chalk when it was planning to shift to full scale reliance on Central American production of the Valery to meet Ecuadorian competition, it would be adding another competitior, but with closer proximity to the United States market, and let IRCA off the hook. What United wanted

at that stage, was less, not more, competition. Thus, foreclosure of competition was a significant United motive in not selling to Chalk.

On January 10, 1964, United advised Chalk by letter that based on the report of Mr. T.A. Holcombe "there remain in Tiquisate only a few hundred acres of banana producing land of the subsidiary which have not been sold or committed to others. *** it also appears that my suggestion that sufficient land be re-acquired or leased to reconstruct a banana producing division is not economically feasible." (II 412A-3A) Thus United opted for termination of the Chalk talks based on alternative No.2, which was a cover-up. Arguendo, it was also a misrepresentation since alternatives No.1 and No.3 were real alternatives. Under No.1, United could repurchase acreage and cancel outstanding commitments and under No.3 United could enter into negotiations with Chalk to sell him assets at Tiquisate as well as Bananera. The above statement of facts demonstrates that the Court's critical findings on the Chalk negotiations were clearly erroneous. Thus United terminated the negotiations with Chalk on the basis of a cover-up and for none of the reasons United assigned in its litigation stance. United thereafter backed off from selling Tiquisate to Chalk. CAG terminated its shipments from Tiquisate on July 31, 1964 (II 469A).

3. <u>United Did Not Seriously Attempt To Sell Tiquisate As A Going Concern To Others.</u> A contemporaneous company transcript (II 788A, 792A) demonstrates that in November of 1963 when Sunderland and Fox met with United's competitor,

Ecuadorian Fruit Company, and when it asked to be given consideration as a purchaser in regard to the sale of assets under the decree, Sunderland and Fox made no mention of the immediate availability of Tiquisate even though the Board had authorized the sale of the assets of CAG and even though Sunderland at that time knew that the variety test at Tiquisate was in excellent shape (II 917A as of February 1963, II 524A when the Division of Tropical Research as of September 1963 was reporting that the yields obtained on the variety banana at Tiquisate "are so excellent").

Fox, during cross examination, when asked whether they offered to sell Tiquisate to Ecuadorian Fruit at that meeting, was evasive and stated: "We never excluded Tiquisate" but when pinned down, admitted as follows: "You never offered it to them, did you? A. No." (TR 1792-3). The complete transcript of the November 1963 meeting with Ecuadorian (II 767A-797A) shows that United did not try to sell Tiquisate to Ecuadorian at that time, even though it would have been most appropriate because discussions had commenced with Chalk, and the Board in September 1963, just two months before, had authorized the sale of Tiquisate's assets.

For all practical purposes, United disposed of the land at Tiquisate in such a manner as to make certain that no one would come in and grow bananas there. The land at Tiquisate was cleared, it had a townsite, irrigation, and 90 miles of railroad; Tiquisate was connected to IRCA for transportation

to Barrios. So existing facilities were in place and banana land abandoned to Panama disease is ideal for growing Valery bananas (III 1136A).

The result of all the sales of land by United in western Guatemala was that no one became a producer of bananas there. That plus the other evidence set forth leads to the conclusion that United's policy was set for the purpose of excluding purchasers who would go into the banana business. Inter alia, United sold to farmers who would "undoubtedly ... plant it to cotton*" (PX 1003, PX 521); it removed irrigation equipment necessary to a banana plantation (II 427A, 432A); it tore up 90 miles of tracks at Tiquisate (TR 372-4): in some instances it exacted formal conditions against banana production in its leases (PX 125, p.3, "Third" PX 74, PX 508, PX 513-516, PX 534, PX 543, PX 548, and PX 667); CAG also sold at least 5,500 acres to United's employees and former employees (II 808A-810A, PX 1522, PX 1010) who undoubtedly would not go into the banana business.

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* A United memo, erroneously excluded from evidence (TR 1155-6) demonstrates that putting banana lands into cotton was a United method for preventing its use by competitors for bananas (III 1391A, for identification, 6/24/60, a memo by Miller which contained admissions against interest) he stated re Tiquisate:

> "However, because of the large areas of good land available on this coast which are of potential danger to our West Coast markets in the United States if a port is built on the Pacific, we propose to make every effort to retain our good banana lands. Company lands not in bananas will be utilized by us for pastures, or will be leased for cotton growing or pastures to local farmers."

That same reasoning applied in 1963 re the decision not to sell Tiquisate as a going concern for fear that competitors would produce the Valery banana there, box them and ship over IRCA for shipment to U.S. gulf and eastern ports.

4. United's Cutback At Tiquisate And Increase In Purchases In Ecuador. The evidence recited below demonstrates that contra the Court (I 326A, 183), there was a cutback in production at Tiquisate. In December 1959, after the affirmance by the Appellate Division in Ripley, United ordered CAG to prepare a 5-year plan which would include no planting of Gros Michel bananas and in each year the replacement of 500 acres of Gros Michel bananas with Cocos (I 325A, 179). United realized "that due to abandonments the 5-year program will show a diminishing acreage and, consequently, production will go down and cost will go up (II 501A). By June 1960 United had decided to commit no further funds to maintain production at an economic level at Tiquisate and projected that its banana production there would expire in 1964* (II 374A). CAG in 1960, anticipating an imminent decision by the Court of Appeals in Ripley, stated that it would curtail its operations if there was an increase in the IRCA freight rate on its shipments to $130 (II 378A-9A (last ¶)). From 1960 through its abandonment in August 1964, United made no further significant plantings at Tiquisate (II 374A-5A).

After the decision in Ripley in December 1960, United, commencing in January 1961, arbitrarily limited the Tiquisate

* The court erroneously excluded from evidence a memo by United's executive vice-president, which contained the following admission against interest: "With the rapidly declining production in these areas [Guatemala and Honduras] and the decision to commit no further funds to maintain production at an economic level ..." it is necessary to make a realistic appraisal of the value of United's investment there (III 1384A, for identification, 6/15/60; TR 2031).

supply of fruit to the market; the manager of CAG complained (PX 520): "This year we have produced the best fruit this Division has ever produced in the month of January ... Though this is true, we have orders to cut only top quality fruit. ..." This policy continued in 1962 with the Comptroller of United stating (II 570A): "Over 100,000 stems of fruit have been left behind in Guatemala West to date this year ..."; United reduced CAG from a "division" basis to a "district" basis (II 570A).

During the years 1955 through 1958, United planted 2000 acres in <u>each year</u> at Tiquisate (TR 1367-8). This tended to keep the acreage at about the same level because of acres lost to Panama disease and blowdowns. But there were no new plantings in Gros Michel in 1959 (TR 1367), 1960 and thereafter (II 501A, 374A-5) which affected production adversely during 1961 through 1964.

Thus, a banana replanting program of 2,000 acres per year during 1959 through 1963, for a total of 10,000 acres, which was consistent with the 2,000 acres planted in each year 1955, 1956, 1957 and 1958 (TR 1367-8), would have more than replaced the 8,652 acres abandoned from 1959 to 1963 (DX 503) due to blowdowns, panama disease and nematodes and would also have prevented the dropoff in acreage during this period. The year 1960 was the last full year immediately preceding the statutory recovery period and it compared with subsequent years as follows:

Year	CAG Banana Carloads (II 807A)	Acreage in Bearing End of Year*	Stems Shipped (II 807A)	IRCA Dollar Revenue Therefrom (II 807A)
1960	17,559	18,237	4,623,468	$2,283,000***
1961	13,693	15,085	3,481,128	1,780,000
1962	7,305	14,289	2,068,670	950,000
1963	9,177	13,272	2,709,004	1,193,000
1964 (7 mos.)	6,790	12,300	1,835,000**	887,000****
1965-8	-0-		-0-	-0-

At the time that United was restricting its plantings and shipments from western Guatemala, it was increasing its open market purchases in Ecuador. In the 1950's, United imported from Ecuador,***** hoping in that way to block the competitors from acquiring more bananas for the United States market. United's policy was, in effect, the bananas we don't buy in Ecuador will

* III 1040A, 1236A, 1244A, 1251A, PX 1557, p.4

** II 908A

*** After adjusting for the Ripley increases paid in 1961 (II 802A-1).

**** PX 1557, p.8

***** United's share of the supply of Ecuador fruit imported into United States ports was (for 1954-63, II 415A, for 1964-5 computed from III 1331A and 1256A):

1954	33%	1960	35%
1955	31	1961	32
1956	26	1962	32
1957	25	1963	24
1958	21	1964	9
1959	31	1965	1

be "snapped up and shipped by the competition."*

At the time of United's increased open market purchases in Ecuador in 1958 through 1960, there were no United plans for the complete conversion to the Valery or any other variety; that policy decision was made in 1963 (I 302A, 139).

United was engaged in a program of open market purchases in Ecuador during 1958-1960, which resulted in its losing money, on an out of pocket cash basis,** on all the stems of bananas it bought there for shipment to the east coast (in 1960, also to the gulf ports) of the United States (TR 1877-1884); the more United bought, the more it lost. United's motive was anticompetitive; it was using increased purchases in Ecuador to pursue a policy of "dumping" on the east coast which predatory policy demonstrates objectively a clear intent on United's part to attempt to monopolize the banana import trade of the United States, at least for the eastern division of the United States. It is noteworthy that Sunderland was President during all of 1960 while this policy was pursued and should be contrasted with the Court's finding of "sincerity of Mr. Sunderland" (I 219A). Non-monopolists do not increase their purchases as dramatically as United did in Ecuador, from 3.1 million stems in 1958 to 6.5 million in 1959 and 7.4 million

* While the statement was made in 1964 (PX 54, p.2), it was clearly United's policy in the 1950's.

** United had an out of pocket cash loss per 100 lbs. of $1.41 in 1958, $1.06 in 1959, and $.74 in 1960 (III 1379A plus cost of 15 cents per 100 lbs. for discharging in U.S. - TR 1877-TR 1884, TR 1728).

million in 1960 (III 1331A) for the United States market, while losing money on all shipments to the eastern United States.

United knew that if it didn't buy those bananas and ship them to the United States market from Ecuador, its competition would.* Therefore if United had not increased its purchases in Ecuador, its competition would have shipped the same 3,000,000 stems to the United States market and United would have brought in an additional 3,000,000 stems from its own divisions. Accordingly, the total supply of bananas in the United States market would have been increased by approximately 3,000,000 stems per year. Out of pocket losses incurred by United on every purchase and shipment to the east coast of the United States in 1958 through 1960 was clearly an anticompetitive practice. Thus United for monopolistic and anticompetitive purposes was holding down its production in Guatemala West, in order to make its open market purchases in Ecuador and limit the total supply coming into the United States (TR 1788-9).

United would have done better in this same 1958 to 1960 period with bananas from Guatemala West to the combined eastern ports of the United States.** United conceded that it lost money in both 1959 and 1960 on all sales of bananas in the United States from Ecuador.***

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* Fox so testified: "Q. And the belief being that any fruit that you didn't take from Ecuador, that competitors would obtain that fruit and sell it on the market ? A. Which they invariably did" (TR 1728).

** Guatemala West had an advantage over Ecuador per 100 lbs. by $1.29 in 1958, by $.82 in 1959 and by $.20 in 1960 (TR 1851-9, Cf. III 1378A with III 1379A).

*** III 1379A plus cost of 15 cents per 100 lbs. for discharging in U.S. -TR 1877 - 1884, TR 1728; REPPF 159 fn.

IRCA has standing re the Ecuador situation because it was part and parcel of the same anticompetitive pattern which included the reaction to <u>Ripley</u>; defendants, instead of cutting back at Tiquisate, would have increased its plantings and production at Tiquisate and shipped more bananas over IRCA but for its Ecuadorian policy.

Plaintiff's case on CAG's restriction of its shipments, of course, does not depend only on United's policy in Ecuador; plaintiff's <u>primary</u> position is that, pursuant to its monopolistic position and combination with CAG and by virtue of its contracts with IRCA in Western Guatemala, it was able to and did restrict and terminate shipments from that source of supply for monopolistic and anticompetitive reasons.

Miller, the head of United's agricultural department, stated that if United had converted the entire Tiquisate Gros Michel acreage to Cocos for an investment of about $750,000 in Cocos plantings at Tiquisate, it might well have enjoyed a $5,000,000 <u>profit</u> per year (II 519A). Miller also stated that the cost to convert to Cocos was only $48 per acre and "If this program had been carried out <u>as planned by the Production Department</u>, shipments from Tiquisate during 1962 would have been about <u>200% greater</u> than actual shipments" (II 519A). Of great significance is the fact that the production department's planned increase of Cocos production at Tiquisate was blocked by top management. Miller in 1963 attached the above memo on Cocos at Tiquisate (II 519A) in support of a recommendation regarding conversion of Gros Michel areas to Cocos in Golfito and Armuelles (II 895A-7A). Cocos bananas could be grown successfully at

Tiquisate and its yield there far exceeded the Gros Michel (PX 696). Thus, if Guatemala West had planted extensively in Cocos banans, replacing the Gros Michel, as in part was done at Armuelles and Golfito, CAG, instead of being in a steady decline from 1961 to 1964, would have shipped bananas at least at the rate shipped in 1960, to wit, 4,600,000 stems per year (II 807A).

The Court's finding that the "planting of Cocos was an interim measure" (II 328A, 188) is contrary to the overwhelming statistics showing that by 1965 38% of United's then existing acreage of 97,375 acres was in Cocos bananas* (III 933A). That, translated into acreage, would be approximaterly 37,000 acres. Since the largest number of acres planted to Cocos bananas was located in Armuelles and Golfito and only 577 acres were planted to Cocos bananas in 1964 (TR 1531), which means that over 36,000 acres were planted to Cocos bananas as of the end of 1963 and therefore a substantial amount of Cocos bananas were in bearing during the period 1960 to 1963. It is plaintiff's position that but for the Ripley decision and United's monopolistic curtailment of its Tiquisate operation, from 1960 forward, Cocos would have been planted at Tiquisate, as planned by the Production Department (II 519A).

United during the period 1960 through 1963 was planting Cocos extensively in certain of the other divisions; for example, United's plantings of Cocos in 1963 called for 5,664 acres in Golfito and 4,512 acres in Armuelles (II 820A). Both Golfito

* The Court's other findings (I 328A-9A, 188(a)-(c)) on the Cocos are incomplete and clearly erroneous since they fail to consider the pertinent documentary evidence covered herein.

and Armuelles, like Tiquisate, are operations on the west coast of Central America. The evidence demonstrates that Cocos bananas grown in Tiquisate did in fact have a substantially higher yield per acre than Gros Michel at Tiquisate despite blowdowns. In 1962 the yield per acre for Cocos was 369 stems per acre while the yield per acre for Gros Michel was 71 stems per acre at Tiquisate (PX 696). The average weight for Cocos at Tiquisate "was 80 pounds and 65 pounds for Gros Michel" (PX 979).

While it is true for a brief period throughout the entire company there was a policy not to plant Cocos; in January 1962, a Vice President of United stated: "This decision has since been changed and everyone is happy about this" (PX 611, p.2). In 1962 Fox stated with reference to Tiquisate that "new plantings should undoubtedly be in Cocos because of wind risk" (PX 20, p.2). In October 1962, van Diepen stated: "I am pleased to learn ... that the Cocos plantings in Tiquisate are so improved" (PX 872).

As early as 1959, 47 acres of Cocos bananas in Antigua farm at Tiquisate demonstrated dramatically its resistance to blowdowns when the areas of Gros Michel on each side of the Cocos plot were practically 100% damaged, with insignificant damage to the Cocos plot. The manager of the Guatemala Division expressed the view at that time (which was before the Valery) that only Cocos should be planted in the Tiquisate area (PX 2083,2085). In 1960, van Diepen, then manager of CAG, stated that Cocos stood up "without damage under windstorms" which seriously damages Gros Michel (II 494A). In December 1959,

van Diepen stated: "Excellent fruit is being reaped from the various Cocos nurseries. It is surprising to see the potential of this large long-fingered fruit and not too open-handed" (PX 498, p.3). In April 1962 van Diepen with reference to "Cocos Plantings - Tiquisate" stated: "It is important to determine how this notably blowdown-resistant and high-producing variety will perform under virgin soil conditions..." (II 568A)

In a letter to the President of United, Bump in early 1961 stated (II 430A):

> "I am not cognizant of the 1960 blowdown results. However, previous years results indicated that Cocos bananas, because they resist windstorms, may be produced in Tiquisate at the rate of over three hundred (300) stems per acre. Assuming these figures to be correct, if the Division were planted to Cocos (or a similar strong, low-growing, disease resistant variety), that Division's fixed cost per stem, such as depreciation, overhead and general costs would be reduced something like one third. The cost of bringing back blowdown areas would be almost eliminated. The great peaks in production would be reduced and fewer men and machines would be required for harvesting."

It was part of the regular course of business for United to have limited abandonments in each division in each year due to factors such as Panama disease. A United official in 1963 stated (III 1135A) that since its formation "it has abandoned more than 925,000 acres of Gros Michel banana cultivations - mostly due to the ravages of Panama disease. This is an average of about 15,000 acres* per year." Therefore

* 75 to 90% were caused by Panama disease (III 1135A).

Panama disease was not limited to Tiquisate but was throughout United's operations. The point is that with abandonments, United normally planted Cocos in the 1960-1963 period, in order to continue to maintain the amount of acres in production in Central America. Thus with planting programs, United's acreage in production from the end of 1962 to the end of 1964 was expected to increase significantly at Bocas (Valery), Armuelles (Cocos) and Golfito (Cocos) (PX 1479, 3rd sheet). But for United's <u>reprisal</u> for <u>Ripley</u> and its monopoly position in Guatemala and Central America, United would have continued its planting and production at Tiquisate, with resulting shipments over IRCA. It is noteworthy that Tiquisate was never truly given a significant opportunity with the Cocos bananas, as were Armuelles and Golfito, where production per acre did in fact increase. The fact is that Tiquisate also had all the indicia of being a successful division with the new Valery banana.

5. <u>United's Monopoly in Guatemala.</u> The Court found that "United-CAG at all material times exported most or all of the bananas sent to the United States from Guatemala" (I 254A,6). It assumed that United was a monopoly.*
It assumed, "arguendo, that the relevant market for purposes

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* It stated (I 224A): "I leave to one side the question of whether UF by the 1960's was a monopoly or close to a monopoly, and assume, for the moment, that it was."

of Section 2 of the Sherman Act is the importation of bananas into the United States solely from Guatemala ..." (I 215A) and that the "relevant market under the Sherman Act is the 'service of transportation of bananas from the western side of Guatemala to Puerto Barrios on the Atlantic side for shipment to the United States'" (I 250A, ftn. 13).

The District Court also found (I 225A, 7):

> "IRCA was used as the means for transporting substantially all of the bananas from growing areas to sea-board for export from Guatemala to the United States. At all material times, IRCA has been the only practical means of moving bananas in volume from the growing areas of Guatemala to Puerto Barrios, the main Guatemala port of export of bananas shipped to the United States."

It also found (I 253A, 3): "To market CAC bananas required at all times that they be shipped over IRCA to Barrios."

Western Guatemala was a substantial market (source of supply). In 1960, 5,062,000 stems of bananas were imported into the United States that originated in western Guatemala and were shipped over IRCA via Barrios to the United States (II 806A-7A, 727A); this was approximately 10%* of the bananas imported into and sold in the United States; since bananas from western Guatemala were only imported into Gulf and East coast ports of the United States, then western Guatemala's share of those markets was even higher than 10%.

Thereafter, bananas imported into United States ports from western Guatemala declined as follows (II 806A-7A, 727A, 847A, 908A):

* See appendix to this brief, pp. I and J.

Year	Stems
1960	5,062,000
1961	3,308,000
1962	336,000
1963	112,000
1964	8,000
1965	-0-
1966	-0-
1967	-0-
1968	-0-

Thus western Guatemala, due to United's antitrust violations, dried up as a source of supply for the United States market.

The significance of western Guatemala as a source of supply for the United States is demonstrated by the fact that in 1960, United's western Guatemalan bananas constituted 19% of all of United's bananas imported into the eastern and gulf ports* of the United States from countries, other than Ecuador (III 1330A-1A, II 849A-50A). That demonstrates the significance of western Guatemala as a United source of supply for the United States before the effect of the cutback and elimination of CAG's shipments. In 1960, Western Guatemala supplied 1,660,000 stems of fruit competitive to United for the United States; only two other countries provided more competitive fruit (Ecuador and Honduras, II 727A).

United <u>imported</u> into United States ports 67.2% and 67.6% of the stems of bananas brought into ports of the United

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* All of United's bananas imported into the United States from Guatemala came through the eastern and gulf ports.

States from western Guatemala in the years 1960 and 1961 respectively (II 727A). After 1961 until it terminated its shipments in July 1964, United imported substantially all of the bananas imported in the United States from western Guatemala (II 727A, 908A, 826A, TR 77-8). United's share of west Guatemala exports to the United States for the period 1954-1964* ranged from 64.1% to 100%. Substantially all the competitive fruit** exported from Guatemala were shipped to United States ports (II 727A, 806A-7A). However, some of United's bananas from western Guatemala were shipped to Europe; in the period 1962-1964 most of United's bananas were shipped to Europe. Thus United's share of all bananas shipped via IRCA to Barrios for shipment to Europe and the United States ranged between 73.7% and 87.9% for the period 1956 through 1960 (II 806A-7A). In 1960 United*** and Standard shipped over 6.2 million stems of bananas over IRCA to Barrios from western Guatemala (II 806A-7A). United shipped 73.7% and 76.7% of the stems of bananas transported by IRCA to Barrios from western Guatemala to the United States and Europe in the years 1960 and 1961, respectively.

United had practically a 100% monopoly on shipments of bananas from eastern Guatemala to Barrios for export.****

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* See appendix to this brief, p. A.

** For Standard's shipments over IRCA, see appendix to this brief, p. B .

*** For the statistics on United's shipments from western Guatemala via IRCA to Barrios, see appendix to this brief, p. B.

**** For United's shipments from eastern Guatemala via IRCA, see appendix to this brief, p. C.

It is an undisputed fact that from 1954 until 1964, United exported to the ports in the United States substantially all the bananas carried over IRCA via Barrios from Eastern Guatemala and the same for export to the United States and Europe (PX 1396, p.3, II 727A).

6. Central America's Water Transportation Advantage Over Ecuador. Bananas imported through ports in the United States from countries other than Ecuador (hereinafter called "Central America" - term used by United, II 814A) is a separate relevant market. East coast ports of Central American countries, such as Guatemala, Honduras and Panama, had a very significant water freight advantage over bananas from Ecuador that had to travel through the canal to gulf and east coast ports in the United States (the gulf and east coast ports serviced United's east and central divisions which consumed over 75% of United's banana imports into the United States (II 822A)). Thus, on shipments of boxes of bananas from Guatemala and Honduras to the Gulf* ports in the United States, the water freight rates

* On such shipments to east coast ports of the United States, Guatemala and Honduras enjoyed a $.42 box advantage over Ecuador (II 903A - from Guatemala and Honduras $.46 per box and Ecuador $.88 per box); also see PX 1530 to the same effect.

On shipments of bananas by the stem from Guatemala to the Gulf ports in the United States, the banana freight rates on United's vessels gave Guatemala a $20. per ton advantage over shipments from Ecuador (II 905A - Based on per ton cost from Guatemala of $13.50 and from Ecuador of $33.50). (That should be contrasted with the rail haul from Tiquisate to Barrios at $130. per car or about $11 a ton for cars loaded with 12 tons).

on United's vessels were $.30 per box compared to $.76 per box from Ecuador or a $.46 per box advantage (II 903A); therefore, water freight cost to ship from Ecuador was over 150% higher than from the eastern ports in Honduras and Guatemala.

The ocean freight advantage in Guatemala and Honduras over Ecuador on shipments to the <u>east</u> coast ports of the United States was $15 per ton, about a 75% advantage. Almirante (Bocas) in Panama had a 100% and 55% ocean freight advantage over Ecuador to gulf and east coast ports of the United States, respectively (II 905A). Even Golfito (Costa Rica) and Armuelles (Panama), located on the west coast of Central America, had an ocean freight advantage of 46% and 25% over Ecuador to the gulf and east coast ports, respectively (II 905A).

7. <u>United's Monopoly in Central America.</u> United monopolized the Central America source of supply; its share of that Central America market for imports through United States ports ranged between 70% and 82% in the period 1954 through 1964.* Thus United had a clearcut monopoly in that period over that source of supply.

Since Ecuador was at a water freight disadvantage of up to 150% in competition with east coast ports of Central America,

*	1954	78%	1960	76%
	1955	79%	1961	73%
	1956	82%	1962	71%
	1957	76%	1963	70%
	1958	77%	1964	71%
	1959	75%		

(II 416A, 814A)

United in 1963 decided on a five year plan (III 1150A) to compete with independents from Ecuador by increasing its Valery production in Central American countries, where it would be able to get production of at least 400 stems per acre which would dramatically reduce their per unit tropical cost and then end up with a lower landed cost in the United States than Ecuador because of their water freight advantage. In this respect, United was relying on maintaining its monopoly over the supply of bananas exported from Central America to the United States, to wit, above 70%.

In that connection, the District Court found (I 302A, 139):

> "Part of the plan was to eliminate Ecuador as a regular source of supply for the United States and Canada by the end of 1965 (DX 352, p.3). This necessarily meant that United would limit its production to certain areas in Central America and thus hope to compete against independents from Ecuador by high yield production of the Valery, fully boxed, and shipping from Central America with a competitive ocean freight advantage over Ecuador. As a part of this program United decided to phase out Tiquisate (PX 1277, p.2). United's arrivals from Ecuador to the United States declined from 7.4 million stems in 1960 to 0.3 million stems in 1965 (DX 557)."

Thus, the phaseout of Tiquisate, as found by the District Court, was <u>part of the plan</u> to eliminate United's purchases in Ecuador and concentrate 100% of its supply in Central America, which meant increasing and maintaining its monopoly position in Central America. Certainly then, a substantial purpose in phasing out Tiquisate was to maintain its monopoly in Central America.

The plan was in fact implemented. In 1965, United's purchases from Ecuador for import into the United States ceased completely, and thereafter it imported no bananas from Ecuador (III 1331A). In 1964, United terminated its operations and shipments from Tiquisate in western Guatemala. United's monopoly over the supply of Central American bananas for the United States market increased from 71% in 1964 to 76% in 1965, 76% in 1966 and 75% in 1967, then decreased in 1968 to 68%.* Thus United successfully tightened its monopoly over the Central American supply for the United States market.

In turn, Central America's share of the United States market increased from 63% in 1965 to 70% in 1966, 73% in 1967 and 80% in 1968 (Appendix F to this brief).

In 1964, United imported 19.5 million stems into United States ports from Central America and by 1968, it imported 31.2 million from Central America, an increase of 11.7 million stems.** In 1964, independents imported into ports in the United States 22 million stems from Ecuador and by 1968, it was down by 10 million to 11.9 million stems.** Obviously, United's 1963 plan to use its Central America monopoly to compete against Ecuador proved to be successful.

* See appendix to this brief, p. D.

** See appendix to this brief, p. L.

	Millions of Stems	
Year	United's Central Am. Imports U.S.	Ecuador's Independent Imports U.S.
1964	19.5	22.0
1965	23.6	19.5
1966	28.8	17.0
1968	29.2	15.3
1968	31.2	11.9

But the success of that plan depended upon denying competitors access to Guatemala west in order for United to maintain its Central America monopoly. Production of 4.5 to 9 million stems in the hands of competition in western Guatemala, with the same ocean freight advantage as United from Barrios to gulf and eastern ports for the United States, would have subverted United's entire five year plan.

The documents demonstrate that United feared an increase in a competitive source of supply from Central America. Two United vice presidents in a 1964 memorandum to Mr. Sunderland stated that their first concern was that "planting of variety bananas by competitors nearer the market than Ecuador for the U.S. market could increase" and that "could have an adverse effect on the United Fruit Co. greater than anticipated." (II 697A); they further warned that a 3% annual increase in imports* by the company and competitors during the five-year plan could drop the average price per box in 1969 to $2.75 whereas the company was striving for a price of $3.00 per box. They also stated:

> "Everyone remembers only too vividly the pricing and marketing debacle of the summer of 1960 and the more recent one during the fall of 1963. An oversupply situation in the banana industry is similar to an oversupply situation with an agricultural commodity with one significant difference--the product cannot be inventoried to bring supply and demand into some semblance of balance. It must be brought to market or lost." (II 695A)

* In a 1961 memo to Fox (II 508A) a United official stated "Any action that we take in any division may affect prices in the United States if it affects total supply."

To further demonstrate United's concern with competitive shipments from the sources close to the United States* United's vice-president in February 1963 stated (PX 681) in connection with a take-over of land and improvements by the Government of Costa Rica that United would insist upon the right of first refusal to market any and all bananas grown on those lands because it would be poor management to have such assets "used to the company's detriment by a competitor." Surely, that same thinking was used regarding the closing down of Tiquisate. The President of United, in February 1964, stated that "the Board of Directors has asked us to keep in touch with developments in Mexico" since "as you know, banana competition from there almost bankrupted the United Fruit Company at one time ... but Sigatoka disease took over and they were unable to handle it" *** - "keep a running check on what is happening with regard to banana production in Mexico generally." (II 898A)

United's general counsel warned Sunderland that one of the dangers of an associate producer program, especially in "all places where transportation and loading facilities exist" [which description fits IRCA and Guatemala] was the sale of bananas by United's contract producers of bananas to competitors (II 690A).

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* In 1963 the Executive Vice President of United tried to prevent a potential competitor from planting in Turbo, Columbia by advising the Agency for International Development (AID) that AID not make or guarantee a loan of $300,000 to an agricultural company organized to cultivate and produce bananas (PX 739, p.2, 1st ¶).

United in 1963 and beginning in 1964 recognized that creating a competitor should be put off until the maximum time permitted under the consent decree. In January 1963, United's executive vice president* stated (II 517A) in connection with compliance with the consent decre: "... discussion along these lines would be <u>premature</u> ... under the Decree we have until mid-66 to present our divestiture plan." In August 1963, he said, an assumption for a <u>five</u>-year plan is that the "effect of the Consent Decree spin-off can be <u>ignored"</u> (PX 1277). In fact United put off compliance with that part of the decree until 1972 (III 931A).

In 1963, it would have been inconsistent with United's monopolistic objectives to create a competitor in Western Guatemala or to sell CAG as a going concern since the premise was to beat the competition from Ecuador by Central American shipments.

8. <u>United's Monopoly In, Or Attempt To Monopolize, The United States.</u> United attempted to monopolize the import of bananas into the United States and that was a significant motive in United's foreclosing competitors from purchasing Tiquisate as a going concern. The District Court found** that "United at all material times has been by far the largest

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* On another subject, the view of Fox appears to reflect United's general attitude; in connection with turning procurement in Ecuador over to Noboa, Fox in August 1963 stated (PX 746): "Of course, we must weigh the substantial risk of putting our fate in the hands of an outsider ..."

** It stated (I 224A): "I leave to one side the question of whether UF by the 1960's was a monopoly or close to a monopoly, and assume, for the moment, that it was."

importer of bananas into the United States" (I 265A, 28). The entire United States was a relevant market.

United's share of the United States market (based on sales by weight which is the way bananas were sold) was 60% in 1936, 70% in 1950, 63% in 1955, 57% in 1960 and 1961, 55% in 1962, 48% in 1963, 42% in 1964, 49% in 1965, 54% in 1966, 55% in 1967, 54% in 1968.* The effect of United's 1963 five year plan was dramatic, an increase from 42% in 1964 to 54% of the United States market in 1966 or an increase of 12% in only two years.

United's share of the United States market started to slip as the independents imports from Ecuador increased dramatically in the late 1950's and early 1960's. As seen, quite dramatically from the District Court's findings as competition increased for United, its average prices declined at all U.S. ports by over $2.10 per 100 lbs. between 1955 ($7.43) and 1960 ($5.33) (I 299A, 132(b)). In that same period competitive fruit from Ecuador increased from 11.8 million stems in 1955 to 18 million stems in 1960 (DX 507 minus DX 557). On United's 2 <u>billion</u> pounds imported into North American ports in 1960 (II 417A), that meant a <u>drop in revenue</u> in 1960 of over $42,000,000, from the higher 1955 price.

Thus in the period 1955 to 1963, United's major problem was how to meet the competition of low production

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* See appendix, p.G.

cost, high water freight bananas from Ecuador (I 299A, 132(b)). United continued its monopoly over the supply from Central America but Ecuador had penetrated the total U.S. market and in 1960 had 45% of that market (I 299A, 132(a)). Clearly then one of United's most significant motivations in its 1963 five year plan was to restrict or eliminate its competition from Ecuador and utilize its Central American monopoly in an attempt to monopolize the American market. United's share of the Central America supply increased to 76% in 1965, 76% in 1966, 75% in 1967 and 68% in 1968; thus, further consolidating that monopoly position.

The success of United's attmept to monopolize the United States market is demonstrated by the fact that in the year 1968, Central America's share of the United States market was 80% (63%, in 1965, 70% in 1966 and 73% in 1967), and Ecuador's share dropped to 20.2%* from the high of 45% it had in the year 1960, but more significantly, shipments by <u>independents</u> from Ecuador dropped from 22 million in 1964 to below 12 million stems in 1968, thus dramatically demonstrating the success of United's program to deal a severe blow to the independents from Ecuador. Moreover, shipments from Ecuador continued at below the 12 million stem level in the period 1969 through 1973, to wit, 10 million in 1969, 10.9 million in 1970, 9.7 million in 1971 and 9.8 million stems in 1972 (III 1256A).

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* Calculated from III 940A and III 1256A.

Clearly, maintaining its Central America monopoly was a critical purpose of United's 1963 five year plan. In turn, using that Central America monopoly in an attempt to monopolize the United States market was also a significant purpose of that same plan. The phase out of Tiquisate was also part and parcel of that plan (I 302A, 139). It therefore follows that a significant purpose in United (and CAG's) refusal to deal with IRCA was to maintain its Central American monopoly to attempt to monopolize the United States market, or either. Therefore a sale of Tiquisate in 1963 with a potential of 4.5 to 9 million Valery stems (II 399A) would have severely eroded United's Central American monopoly thereby demonstrating United's purpose in not selling Tiquisate as a going concern to competitors.

9. <u>One Of United's Significant Purposes In Not Selling Tiquisate As A Going Concern Was To Foreclose Competition.</u> It necessarily follows from the analysis above that in order for United to maintain its Central American monopoly, a significant purpose in not selling Tiquisate as a going concern was to foreclose competition. Moreover, United's imports into the United States and Canada dropped by 25% between 1971 and 1973, the years immediately before and after the sale of Bananera to Del Monte in 1972 pursuant to the Consent Decree (from 48.7 million boxes to 36.2 million boxes, II 906A); in that same period other importers (including Del Monte) increased their imports by a comparable amount, to wit, 13 million boxes (II 906A).

In 1973, a year after the divestment under the consent decree, United's share of the United States market dropped to 34.5%.* Thus instead of complying with the consent decree in 1963 - 1964 by the sale of Tiquisate to a competitor, United postponed compliance until 1972 and in the intervening period retained a substantial share of the United States market that would have otherwise been lost to it. Moreover, a sale of Tiquisate would have added 4.5 million to 9 million stems of bananas to the total annual supply of approximately 50,000,000 stems of bananas for the United States market in the intervening years 1964 through 1972, with a corresponding depressing effect on the total United States price structure.

If United had sold the Tiquisate operation as a going concern to competitors in 1963-1964, the probable result would have been a substantial decline in United's share of the market and a corresponding increase in its competitors' share in the years following such sale,just as later occurred. Thus, the results of a sale of Bananera in 1972 demonstrate that United,in 1963-1964,recognized what would have occurred much sooner had it sold Tiquisate to a competitor, thereby leading to the compelling conclusion that a significant purpose in United's not selling Tiquisate as a going concern was to foreclose competition.

10. <u>United's Monopoly In Western United States.</u> The western division of the United States was a separate relevant market. In 1959, United had practically a 100% monopoly; only

* II 906A.

3,500 competitive stems were imported into the western division (II 846A) (assuming United's imports were approximately the same as in the 1960's). In 1960, United had 94% of that market, competitors imported only 476,000 stems (II 845A) while United imported 6,981,000 stems (II 849A-50A). In the period 1961-1964, competitive imports into ports of the western division were 1,775,000 stems in 1961, 1,914,000 in 1962; 2,112,000 in 1963 and 2,080,000 in 1964 (II 823A, 847A). In 1963 and 1964, United imported 9,216,000 and 9,106,000 stems, respectively, which gave it 81% of the western division market (II 822A-3A).

United's monopoly of the western division market resulted in a monopolistic high price for its bananas in that market. For example, despite the fact that the ocean freight cost for shipping United's bananas from Golfito (west coast of Costa Rica) and Armuelles (west coast of Panama) to Los Angeles and New York were practically the same* (II 905A), United in 1960 sold its bananas in Los Angeles for an average price of $6.76 per 100 lbs. as contrasted with an average price of $5.19 per 100 lbs. in New York or a difference of $1.57 per 100 lbs. (II 849A-50A). Thus, United, in 1960, received 30% more on the average price in Los Angeles than in New York based on its 94% share of the western division market.**

In 1963 and 1964, United had 81% of that western

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* Fox conceded the same (TR 1768)

** In response to the Court's question of whether Fox wouldn't be interested in United's share of the market in western U.S. in 1962 as compared with 1961, Fox gave the following answer which was a deliberate untruth: "Yes, as a statistical number of interest, but I was more concerned with how could we possibly <u>make money</u> in selling bananas, and <u>share of market had no relation to this</u> (TR 1769).

division market and its average price for the year there was over 20% higher than in the eastern division (II 849A-50A).

United's former President, former Vice President and former Comptroller all feigned ignorance of United's share of the western division;* even the District Court demonstrated impatience with that lack of candor, which it apparently overlooked in finding United's witnesses "sincere " (TR 1768-9). As this Court stated in U.S. v. Aluminum Co. of America, 148 F2d 416, 432 (C.A.2, L. Hand, J.) "no monopolist monopolizes unconscious of what he is doing." Accordingly, United's monopoly in western United States is relevant and material to the issue of the credibility of United's witnesses.

11. Arguendo, If Material, Plaintiff Proved That The Closing Of Tiquisate Was Not Motivated By Legitimate Business Motives.

a. Landed Cost at United States Ports. Defendants conceded** that the most important single factor in determining the best divisions in which to produce the Valery was the landed cost at the ports in the United States since that combined tropical cost and ocean freight. Accordingly, the "bottom line" for each division was its landed cost per box at particular U.S. ports. Guatemala had a very significant ocean freight advantage to the gulf and east coast ports of the U.S. over Ecuador, Armuelles (Panama - west) and Golfito (Costa Rica - west). Other items that were necessarily included in the landed cost were losses due to blowdowns, diseases, floods, railroad transportation in the

* TR 1768-9, 1622, 1165, 1167.

**DB 120.

tropics, and all other costs of operations. Blowdowns etc. were included because it reduced production and increased the unit cost.

The Court accepted plaintiff's landed cost figures and assumed that they "were accurate" (I 222A). Plaintiff's evidence on landed costs showed that production of the Valery at Tiquisate would be competitive with United's other divisions. A study by Joseph H. Roddy * in October 1963, projected Tiquisate's tropical cost for the Valery, boxed (II 753) which, added to the ocean freight to the gulf ports (II 716A-7A), resulted in a landed cost of $2.18 per box.** That Tiquisate landed cost was a more favorable cost than the $2.41 per box from Honduras, $2.31 per box from Golfito and $2.22 per box from Armuelles; only Bocas at $2.06 per box and Guatemala east at $2.09 per box were more favorable than Guatemala west. ** Ecuador with its high ocean cost was not even in the running. Thus Tiquisate ranked third out of six United divisions.

In addition to a 1963 study of Tiquisate (II 753) and Bananera (PX 760, III 1383A), Roddy also made a study of the tropical cost per box for Bocas, Golfito and Armuelles (DX 574). Roddy made no study of Honduras. When ocean freight (II 716A-7A) is added to the tropical cost, the landed cost per box in New York and New Orleans*** is as follows:

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* Roddy in 1963 was a vice-president of United in charge of compliance with the Consent Decree (PX 1082).

** See Appendix to this brief, p. M.

*** Based on the optimum.

Division	New York	New Orleans
Bananera	$2.12	$1.96
Bocas	2.27	2.12
Tiquisate	2.29	2.13
Golfito	2.31	2.20
Armuelles	2.34	2.23

While Tiquisate is rated No.3 in this comparison, it is practically tied with Bocas for No.2 at the New Orleans port with only $.01 difference in cost; and even at New York, there is only a $.02 difference.

Plaintiff also demonstrated that a 1963 Tiquisate study by Miller (II 387A, III 1370A-7A), when properly adjusted, also supported the proposition that Tiquisate would be competitive with United's other divisions in growing the Valery banana. Miller's 1961 Report is discussed below. That 1963 Miller study arbitrarily assumed production of only 325 stems* per acre (III 1371A) while the separate Honduras study in 1963 (III 1363A-7A) assumed production of 400 stems per acre (III 1365A). No contemporaneous documents are cited to justify this invidious comparison; on the contrary, the documents show that Miller in May of 1963, the same month he used only 325 stems per acre for Tiquisate, advised all his tropical managers to project Valery production at 400 stems per acre (III 1255A). Defendants conceded** on a recalculation of unit cost at Tiquisate on an assumed production of 400 stems per acre, instead of 325 per acre, the projected tropical cost for Valery at port of export is $1.82 per box for Tiquisate as compared with $1.73 per box (III 1366A) for Honduras - an insignificant

* Roddy's study (II 753) was also erroneously premised on 325 stems per acre (III 1380A-1A).

** DRES appendix A-1 to A-4 (Doc. No. 178)

difference as the comparisons are necessarily imprecise. The assumption of 400 stems per acre for Tiquisate is easily justified since that only amounted to "16.4 tons of stem fruit per acre" (III 1255A) and plaintiff demonstrated from contemporaneous documents, unrefuted by the defendants, that the Valery experiment at Tiquisate produced approximately 28.24 tons per acre per year as contrasted with 27.66 tons per acre per year in Honduras when placed on a comparable basis.* Moreover, Sunderland and Fox in 1963 stated that Tiquisate could produce about 4,000,000 stems on 10,000 acres or 400 stems per acre in the Valery (II 560A).

Another invidious assumption in the 1963 Miller study of Tiquisate demonstrates that it "was purposely based on very pessimistic assumptions" (II 518A). Miller assumed in his 1963 study (II 387A) that the capital expenditures at Tiquisate would be $600 per acre ($13,198,000 for 22,000 acres) for Valery bananas, but the backup data for his 1961 report showed that the capital expenditures for the Valery for existing and rehabilitated acreage would be less than $114** per acre for 20,850 acres (II 899A). Thus Miller in his 1963 study deliberately increased the capital expenditure required for Tiquisate from $114 per acre to $600 per acre. Above all, one of the big advantages of the Valery

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* Infra, pp. 75-7.

** Ultimately the 1961 Miller study used a higher figure per acre because it, inefficiently, included 9,150 new acres at over $850 per acre.

was the use of existing facilities in farms that were ravaged by Panama Disease (III 1136A). Moreover, <u>before</u> Sunderland received the <u>1963</u> Miller study (II 387A), he had been advised by his top financial man that the <u>average</u> cost of planting Valery bananas in existing farms was only $300 per acre (III 1136A). So, Sunderland knew the $600 per acre assumed capital expenditure in Miller's <u>1963</u> study of Tiquisate was "purposely based on very pessimistic assumptions" (II 518A).

The reduction in capital expenditure from $600 to $114* per acre would reduce "Depreciation and G.O. Reserve in Operating Costs" about $.14 per box (II 387A) in a typical projected year; thus subtracting $.14 per box from defendants' per box calculation of $1.82 on the basis of 400 stems per acre, makes the adjusted tropical cost at port of export $1.68 per box for Tiquisate as contrasted with $1.73 for Honduras.

Most importantly, Sunderland clearly knew that two "very pessimistic" assumptions were included in Miller's 1963 report, to wit, the low 325 stem yield and the very high capital expenditures. We have thus demonstrated that Sunderland did know in 1963 that "the landed cost figures to U.S. Gulf ports for boxed bananas" (I 222A)** demonstrated that Tiquisate was competitive with United's other divisions for growing the Valery, and further that Sunderland did have "reason to doubt the]1961] Miller Report which showed Tiquisate to be the worst division" (I 222A).** The above analysis is confirmed by Sunderland's

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* On the assumption that only 20,850 acres were planted instead of 22,000 acres as per the 1963 study.

** Contra the Court (I 222A).

statement after receipt of the 1961 Miller Report that "Tiquisate is potentially one of our best divisions" (II 429A) and Fox's statement after the 1961 Miller Report, that Tiquisate "fully boxed, shipping west, and built up from its present planting of 14,000 acres to a 25,000 acre strength could easily become one of the most profitable in the Company" (PX 20,p.2). Shipping west did not change the soil, the blowdowns, the amount of rainfall and other forces of nature now emphasized by defendants, out of all importance to their true status, as demonstrated by the statements of Sunderland and Fox in 1961 and 1962, which are far more credible than, and totally inconsistent with, their testimony of 1974.

With the adjusted cost of Tiquisate fruit at $1.68 per box and Honduras at $1.73 per box, then since the ocean freight on both was the same to the gulf and east coast of the United States, (II 903A) then the landed cost for Tiquisate fruit would have been competitive with the Honduras fruit. Since the ocean freight from Armuelles and Golfito was $.58 per box to the gulf ports of the United States compared with $.35 per box from Tiquisate (II 716A-7A), then the best tropical cost projected in 1963 for Armuelles and Golfito of $1.64 and $1.73 respectively (II 704A) would give those divisions a total landed cost (including ocean freight) of $2.22 and $2.31 per box at the U.S. gulf ports as contrasted with Tiquisate's best tropical cost of $1.68 per box (as adjusted above) and ocean freight of $.35 per box for a total comparable landed cost of $2.03 per box. Thus Tiquisate was objectively projected as more competitive than

Golfito and Armuelles. Tiquisate was also competitive with Bocas* and Ecuador. Ecuador's ocean freight to Gulf ports was $.83 per box (II 716A-7A) and its tropical cost $2.01 per box (II 704A) for a total landed cost of $2.84 per box as contrasted with Tiquisate's adjusted projected cost of $2.03 per box.

To further demonstrate that defendants were aware, and feared exposure, of the transparent "pessimistic assumptions" of the 1963 Miller study, they did not introduce it into evidence. Plaintiff introduced it into evidence (II 387A, PX 33 - TR 1774) on Fox's cross examination; Sunderland had previously testified and left for his home in Arizona, without even attempting to give credibility to the 1963 Miller study. Thus, defendants knew that the 1963 Miller study was, in fact, contrived to reach a result, and that if properly analyzed, demonstrates that Tiquisate was indeed competitive with its other divisions and thus not the worst place to grow bananas. Even though Sunderland ordered the preparation of the 1963 Miller Study (III 1368A, II 387A), Sunderland never even testified about it. Defendants only introduced a 1963 study comparing Honduras with Ecuador (III 1363A) and not with Tiquisate. The document ordering the 1963 Miller study on Tiquisate (III 1368A) and the backup data (III 1370A-7A) on that

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* Bocas' best tropical cost of $1.64 (II 704A) as forecast in 1963 plus ocean freight of $.42 gave it a projected landed cost of $2.06 per box at U.S. gulf ports as contrasted with Tiquisate's $2.03 per box.

study were introduced by defendants on the last day of the trial (TR 1989). Moreover, defendants never produced any 1963 study that compared a projected 22,000 acres of Valerys at Tiquisate with the other divisions even though that was the purpose of the 1963 Miller study on Tiquisate (III 1368A*, Note) and even though we know from a 1964 document (II 704A) that there was a 1963 forecast for the other divisions.

Arguendo, even comparing the best tropical cost of $2.03 per box of Tiquisate as shown on the face of the 1963 Miller study (even on the pessimistic assumptions of 325 stems per acre and an investment of $600 per acre), plus ocean freight of $.35 gives a landed cost at gulf ports of $2.38 per box as contrasted with the 1963 forecast of $2.41 per box for Honduras ($2.06 per box (II 704A) plus $.35 ocean freight (II 716A-7A)) and $2.31 per box for Golfito ($1.73 per box (II 704A) plus $.58 ocean freight (II 716A-7A)). Thus, as contrasted with Golfito at $2.31, with Honduras at $2.41 and Ecuador at $2.84 per box, Tiquisate at $2.38 per box was competitive.

Contra the Court (I 323A, 173) while DX 352 (III 1157A-8A) is a five-year forecast, the numbers cited in that finding are only estimates of Tiquisate's 1963 operating results without the benefit of variety bananas and United itself never considered those figures as a comparative cost study. Moreover, Roddy when

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* Sunderland wanted a study of Tiquisate that assumed:

> "2. Plant the division to low growing variety (Valery) - 22,000 acres."

The note in said letter stated:

> "... No.2 will be worked out in Boston as these would have to be compared with the returns from other divisions, particularly No.2."

That 1963 comparison must have been favorable to Tiquisate, defendants never offered it in evidence or produced it.

referring to such actual operating results with Gros Michel for Tiquisate and Bananera stated (II 527A): "This record is of minor importance* in considering development of Bananera and Tiquisate divisions as producers of variety bananas;" Sunderland referred to the Tiquisate production as "ratty" and said "all of this would produce beautifully in the new banana" (II 561A). Furthermore, Tiquisate's operating cost per 100 lbs. for Gros Michel was lower than Bocas and Bananera (II 821A) thereby demonstrating that historical costs were not decisive in closing divisions to produce the Valery.

b. Valery Experimental Plots at Tiquisate Produced Excellent Yields. In February 1963, the Division of Tropical Research of United stated that the variety (including Valery) trials at Tiquisate "should go a very long way towards determining the future of Tiquisate as a banana division" since they were in "excellent shape." (II 917A-8A) That same division on September 26, 1963 stated that "the yields obtained - ... are so excellent. Decisions probably depend on other factors."** (II 524A-5A) (original emphasis). Moreover, that same document states in the note (II 524A-5A) that Dr. Bauwin's original report was not sent out "since he comments" on proposed closing, but defendants never offered those comments of Dr. Bauwin into evidence. Since the clear implication of the report was that the yields were "so

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* The increase in cost of Gros Michel at Tiquisate was predicted, when CAG in December 1959 stated in connection with the five year plan of no further Gros Michel plantings for Tiquisate (II 501A): "We realize that due to abandonments the 5-year program will show a diminishing acreage and, consequently, production will go down and cost will go up."

** The Court completely overlooked this powerful documentary evidence that proved that Tiquisate was not the worst place to grow Valerys.

excellent" then Dr. Bauwin's comments must have been against closing the division.

The same report stated the quality of the fruit was "exceptionally good", and despite the wind velocities recorded in the experimental area of 25 miles per hour at 10 feet above ground level and 40 miles per hour at 20 feet above ground level on April 13, 1963, "there were no stems of fruit lost in our experimental area on these dates" and "there was very little leaf damage" (II 524A).

Sunderland and Fox's statements to Chalk in November and December of 1963 demonstrated their knowledge of the above results from the Tiquisate Valery experiment. They stated to Chalk that Tiquisate could produce about 4,000,000 stems on 10,000 acres, or 400 stems per acre in the new banana (an obvious reference to the Valery) and "all of this would produce beautifully in the new banana" (II 561A). Sunderland also stated that we can put together 20,000 or 30,000 acres of the "best banana land" and "You can have just as big a division as you want. There's all the land in the world there in Tiquisate ..." (II 544A-5A) (Also see PX 831, PX 832).

United advised Chalk in November 1963 that Tiquisate was one of the best locations in the world (proximity to market), that its properties were "one of the most fertile banana areas in the world" (II 399A, 2nd ¶), that its total area of 30,372 acres could be planted with "a low-growing variety (i.e. wind-resistant) banana resistant to Panama disease" and "will produce more tons per acre than the tall Gros Michel banana", and in its

judgment the Tiquisate lands were capable of producing variety bananas in a number sufficient to enable the subsidiary to export 9,000,000 stems annually to the United States (II 399A). That letter concluded: "At one time Tiquisate was one of our profitable divisions and could be an even greater banana producer again with variety bananas" (II 400A).

Sunderland and Fox's 1974 testimony is directly contra their 1963 statements as per the contemporaneous documentary evidence. The defense, erroneously accepted by the Court, is that Sunderland and Fox lied to Chalk in December 1963 but were telling the truth when they testified in 1974. Stating the proposition refutes it.

Plaintiff demonstated that in the 1963 experimental plots, the yield for Valerys was slightly higher at Tiquisate than at Honduras, on a comparable basis, to wit, 28.24 tons per acre per year in Tiquisate* as contrasted with 27.66 tons per acre in Honduras (III 1133A-4A, 1126A). While the actual results of United's experiments at Honduras were higher than at Tiquisate, that was because Honduras had 483 Valery stems shot per acre while Tiquisate was only planted with an average of 392 stems per acre. Plaintiff used the yield data put in evidence by the defendants for Tiquisate (III 1169A-1170A) and for Honduras (III 1126A, 1133A-4A) and then adjusted the total yield at Tiquisate to what would have been produced with 483 Valery stems shot* to make it comparable with Honduras.

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* For the Valery experiment at Tiquisate, production was 22.96 tons per acre per year (33.44 tons for 1 1/2 years), when there were an average of 392 stems shot (planted) per acre (III 1170A, TR 1381-95). Utilizing the production per 100 stems in Tiquisate and assuming that that average production would apply to the added 91 stems for Tiquisate or 483 stems as were in production in Honduras, plaintiff calculated that Tiquisate was producing (footnote continued on next page)

The results of the two crops of the Valery experiment at Tiquisate were as follows: first crop, there were "stems shot" ("planted") of 395, "stems reaped" of 393 and "stems lost" only two; thus the "stems reaped" plus "stems lost" accounted for the 395 "stems shot"; second crop, "stems shot" of 389, "stems reaped" of 359 and "stems hanging" of 30; there were no stems lost; thus the "stems reaped" plus the "stems hanging" accounted for the 389 "stems shot" (III 1170A).

An analysis of van Diepen's testimony (TR 1419) confirms that he was a flim-flam artist. First, he confused the statistics (III 1170A) at Tiquisate by using the Valery stems planted ("stems shot") from the first crop and stems produced ("stems reaped") from the second crop. Thus in poor-mouthing Tiquisate he testified that "we see where out of 395 plants per acre we only reaped 359" (TR 1419). Van Diepen by the deceptive device of confusing various numbers from two different crops, attempted to mislead the Court that the difference of "36" between "395" planted per acre and "359" reaped was in some way lost;when "395" referred to the first crop and "359" to the second, with no evidence whatsoever that those 36 were lost; in fact only "two" were lost.

Second, with full knowledge that more than one crop of Valery is produced each year, van Diepen made the invidious comparison of production from one crop at Tiquisate with production

* (footnote continued from preceding page)
5.86 tons per 100 stems per acre per year and determined that 91 additional stems would have produced 5.28 tons per year and when added to the 22.96 tons per acre per year for the 392 stems, results in a yield of 28.24 tons per acre per year for an adjusted 483 stem population at Tiquisate, which would then make Tiquisate comparable to Honduras.

for one year at Honduras (TR 1419-20). When van Diepen was giving the results of one crop at Tiquisate, the stems reaped per acre could never be higher than the number shot. When van Diepen was testifying about Honduras, he stated that from 360 mother plants "we get 540 stems reaped". Since, per van Diepen, the grower could not reap more than 360 stems from 360 mother plants "shot", for any given crop, the 540 stems reaped, from 360 mother plants, were not on a per crop basis but on a production per acre per year basis, which necessarily included more than one crop. Stated briefly, van Diepen was comparing production at Honduras on a per year basis with production at Tiquisate on a per crop basis, although more than one crop would be grown in a year. The testimony by van Diepen, when properly analyzed, is utterly worthless and the Court committed reversible error in crediting his testimony in support (I 219A) of the agronomic reasons (I 221A) for United's abandoning Tiquisate in favor of operations in other countries.

Sunderland conceded that the Valery bananas with which United experimented at Tiquisate were actually boxed and shipped to Barrios (TR 964). But yet United never produced the actual documentary results of those shipments which were the best evidence; instead its witnesses substituted their own ipse dixit, which the Court erroneously accepted (I 313A-6A, 195). United's failure to produce the actual results of shipping the Valery provided United with other opportunities for paper defenses.

The Court made certain adverse findings (I 314A-315A, 159(e)-(n)), based on Mr. van Diepen's testimony, regarding the danger to the Valery from chilling during transit through Guatemala City via IRCA; crediting that testimony was clearly erroneous, since

United never produced the results of its actual Valery shipments and a contemporaneous document by van Diepen in answer to a questionnaire to determine the best place to grow variety (Valery) bananas, stated: (PX 2044): "Variety chills at higher temperature than Gros Michel - should be <u>no problem</u> on Guatemala West Coast." Moreover, the Division of Tropical Research stated, with respect to the low-growing, resistant varieties at the Tiquisate plantations, "This would be an ideal location for such a variety with little or no possibility of chilling" (PX 189). Furthermore, in another contemporaneous document, Sunderland in <u>1963</u> only referred to a cold weather problem in Bananera and Honduras (PX 782, p.2).

c. <u>Boxing and Prices.</u> The Court's findings 174 and 175 (I 324A) comparing Tiquisate prices with the average of all prices received in the United States is irrelevant and immaterial since it only covers <u>Gros Michel</u> bananas shipped in stem form. The issue was whether to convert Tiquisate to a <u>Valery</u> division, with shipment in <u>boxes</u>. As Sunderland told Haase, <u>boxing</u> has "a real significance for Tiquisate" (II 498A); van Diepen,* as manager of CAG, stated that with <u>boxing</u> "it should be possible to increase <u>quality and price returns of fruit sold</u>

* In 1960, the Manager of all of United's tropical divisions advised van Diepen, then CAG's manager (II 494A): that he was in Boston when Tiquisate's first shipment of boxed fruit arrived and "All I heard about it was praise and that it was sold for a fancy price. ... The initial success of your boxing could possibly put an entirely different picture on the Tiquisate operations."

and reduce the overall cost of production ..." and that "would then open the door for the possible introduction of a variety banana ... as the solution to CAG's production and cost problem (PX 2044); a United vice president stated "Boxing Tiquisate fruit should receive priority as the greatest improvement in price should result." (PX 611, p.2).*

Moreover, when Tiquisate bananas were boxed and shipped over IRCA, the price received for them compared favorably with United's other divisions. For the entire year 1962 for boxed bananas sold in the eastern and gulf ports of the United States, the prices received were as follows (II 724A):

	Price per box on Average
Guatemala West	$3.35
Ecuador	3.31
Armuelles	3.30
Bocas	3.29
Dominican Republic	3.28
Nicaragua	2.89

Only Honduras at $3.40 per box and Golfito** at $3.74 per box did better than CAG for the entire year.

Average prices for CAG boxed fruit for the entire year 1962 from the defendants' records is far better evidence of the results of CAG boxing than the highly partisan 12-year old recollection of defendants' witnesses.

United officials in communicating with Chalk about Tiquisate in November (II 398A) and December II 534A) 1963 never raised any question about the feasibility of shipping boxed

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* Also see PX 634, p.3, ¶(c), PX 980 and II 494A.

** Included the higher priced Western Division of the United States.

Valerys over IRCA from Western Guatemala. The fact is that <u>no</u> document - van Diepen authored many, and they were all under United's control - has been offered which establishes that Valerys could not be effectively shipped over IRCA in boxes. In fact, Sunderland had a study conducted of Valerys in 1963 at Tiquisate and no mention was made of this so-called "problem"; moreover, the study by the Agricultural Department (II 387A) was plainly premised on their understanding that it was no problem. It is only a paper problem now created by defendants for purposes of this litigation.

The contemporaneous documents show that United in fact had boxing stations actually installed at Tiquisate as late as 1962 and 1963 (PX 634, p.3, ¶c, PX 980). United wouldn't have installed the boxing stations if it was expecting to have a problem with boxing Valerys for shipment over IRCA, nor would it have been necessary to conduct Valery experiments at Tiquisate (II 524A-5A, 917A-8A, III 1169A-70A) if they could not be boxed and shipped over IRCA to Barrios.

One of the purposes of the Valery experiment at Tiquisate (III 1090A) was to get "much needed information ... under Tiquisate conditions of climate ..." The 1963 Valerys were shipped from Tiquisate over IRCA. Defendants have the records; if there was a problem, they would have produced them; they did not; the above is contra the Court (I 313A-6A, 159).

The evidence does not support the proposition that boxed Valerys will suffer more damage than Gros Michel. Van Diepen in an annual report to Sunderland (PX 2372, p.9) stated:

"Damage during rail transit and handling of stem fruit. Injuries to Gros Michel and Valery stems during loading, transporting and unloading from farms to port showed no difference between the two varieties."

The Court committed clear error in accepting Sunderland's testimony that the Guatemalan Government refused to allow CAG to import the materials needed to make boxes. The objective facts are to the contrary. Bananera was expanded with boxing. Moreover, the contemporaneous documents show that boxing was completed in all United's divisions including Bananera, during 1964 (II 750A, III 1151A)

d. Blowdowns. The Court's finding on blowdown damage as shown on DX 548* (I 323A, 173) is irrelevant to the issue of whether Tiquisate should have been converted to a Valery division since DX 548 (III 1295A) is based largely on Gros Michel production shipped in stem form while we are interested in Valerys shipped in boxes. More importantly, as previously demonstrated, the blowdown experience and leaf damage to the Valery at Tiquisate were practically nil despite high wind velocities during blowdowns in 1963 (II 524A, III 1170A).

e. The Political Climate In Guatemala. The Court stated (I 221A-2A):

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* Defendants conceded (DRES 68) that their exhibit (III 1295A) included many Cocos bananas in Armuelles and Golfito. With Cocos' higher yield per acre, it was a distortion for defendants to make their oversimple comparisons - which was like comparing apples and oranges.

> "I also credit the political reason given, that the political climate in Guatemala was bad, and that if land had to be disposed of, it would be safer not to have two major divisions, Eastern Guatemala and Western Guatemala, in that same country."

United had two divisions in Guatemala for 30 years and had two divisions in Panama, to wit, Armuelles and Bocas, that were going to continue. It is common knowledge that the persons that launched the Bay of Pigs invasion of Cuba in the early 1960's were trained in Guatemala. Its government was friendly to the United States.

The fact that United stayed in Guatemala, through its increased planting at Bananera, demonstrates that Guatemala was not as dangerous as Sunderland's testimony now pretends it was (I 316A, 160). In fact, contemporaneous company records show that Sunderland stated in September of 1963 that he did not think activities in Guatemala were any worse "than they have always been" (II 528A). United's 1963 "Five Year Forecast" states (III 1150A) "Protect Lands Most Vulnerable To Agrarian Reform (<u>Honduras in Particular</u>)" In 1962, the situation in Honduras* became so bad that the Board of Directors were advised that due to agrarian reform legislation passed in Honduras "it became necessary to postpone and possibly cancel our plans for future planting of bananas in that country" (PX 1479, 2nd page).

Furthermore, political considerations had to be weighed against another objective of the Five Year Plan which was "geographic dispersal" (III 1150A). It was known to Sunderland

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* Honduras was rated a greater political risk than Tiquisate (III 104-6A).

that variety fruit would have a cold weather problem in the northern divisions of eastern Honduras and eastern Guatemala (III 199A). Thus, cold weather on the east coast would have affected Bananera and Honduras at the same time, just as political problems would have effected two divisions in the same country.

Further objective evidence of the fact that Sunderland did not believe that Tiquisate would be barred from becoming a Valery division because of political conditions in Guatemala is that in 1963 he ordered a study of the feasibility of transporting bananas from Tiquisate to Acajutla, El Salvador (PX 797). Implicit in Sunderland causing that study to be made was the assumption that Tiquisate was a good place to grow the Valery banana, which necessarily rejected any alleged adverse political climate and also many of the conclusions of the 1961 Miller Report. The all important fact is that if Sunderland and Fox had coerced a $90 rate out of IRCA or had determined that it was economically feasible to utilize a means of transportation alternate to IRCA, then the political cimate, the soil, wind damage and other items would not have barred continuation of Tiquisate.

The Miller Report should be viewed against the background of the threats made by United to IRCA about not shipping at $130 and Sunderland's opinion that the rate was confiscatory.

f. The 1961 Miller Report. The Miller Report was dated on March 9, 1961, within 30 days after the denial of United's petition for rehearing in *Ripley* and about three months after the

main decision of the Court of Appeals in Ripley. It reflected the attitude of United's management toward the Ripley decision.

The 1961 Miller Report (III 1045A) also contained the following caveat: "preparation of estimates for the future naturally requires numerous assumptions which may or may not prove to be exactly accurate." Certainly, the facts about the Valery in 1963 are far better than assumptions in 1961; for example, there were 1963 results from experimental Valery plots at Tiquisate (II 524A) and none in 1961. Sunderland conceded that "the basic assumptions" are a very important consideration in making projections (TR 1121). Miller in commenting on a different report referred to the "outlook assumed" for particular divisions which "was purposely based on very pessimistic assumptions" (II 518A). The 1961 Miller Report was part of building a record file on "our reasons for having to discontinue banana planting in Tiquisate" (III 1212A) to provide a defense for all purposes for abandonment of Tiquisate. Mr. Sunderland did the same thing in August, 1963, when he directed his comptroller to state "the reasons for recommending that it [Tiquisate] be phased out of the banana business ..." (III 1142A).

The 1961 Miller Report must be viewed in the following context: United was preparing studies of alternate means of transportation (I 326-7A, 184-5) and studies to justify the abandonment of Tiquisate, to wit, the Miller Report, in order to carry out the policy stated to the New York Court of Appeals that United would take "its business elsewhere" rather than pay $130. Moreover, Miller was in charge of the Agricultural

Department in Boston and Sunderland conceded that the figures from that department "bear no relation whatever to any figures in the accounting department" (TR 1118-1120).

In any event, the Miller Report dated March 9, 1961 was ancient history by 1963 when United had more current information on the ability to grow Valery bananas at Tiquisate based on actual plantings at its experimental farm in Tiquisate; new input regarding cost analysis, savings on boxing and higher realizations from pricing Tiquisate bananas due to boxing.

The Miller Report was premised on shipments being made on a stem basis* (III 1045A, ¶4); this was contra to the then projected future course of United which was to convert its divisions to boxing (conclusively established by the time the 1963 decision** to abandon Tiquisate in its entirety was made); but in any even contra to Sunderland's view at that time that the "advent of Variety bananas and <u>boxing</u> has of course changed the picture considerably ..." (III 1023A) and "<u>boxing</u>" has "a <u>real significance</u> for Tiquisate" (II 498A).

On the cost side, boxing fruit at Tiquisate would have resulted in an effective reduction in the IRCA tariff from $130 per car to $90 per car by reason of increased capacity to carry bananas in boxed (PX 23, p.2). Even if only 75% of the stems were boxed for the United States as contrasted with 100% of stems

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* By assuming shipment on a stem basis, this study also denied to Tiquisate fruit the advantages to it resulting from higher prices in the United States market for boxed Tiquisate fruit as contrasted with stem Tiquisate fruit (II 724A).

** By the end of 1962, nearly 50% of all United's imports to United States and Canada were boxed (PX 1329, p.2) and in 1963 the plan was "complete conversion to boxes in U.S. and Canada by early 1964" (III 1151A).

for the United States, then United's effective saving would have been 30% or $40 per car, which would have meant an effective per car charge of $90* (PX 23), the equivalent of the pre-*Ripley* rates. But the Miller Report ignored the "boxing" item even though it had greater significance for Tiquisate than other United divisions because of Tiquisate's long rail haul.

The Miller Report also assumed shipments to the east coast of the United States (III 1048A, asterisk), whereas CAG's shipments to the gulf ports best utilized and reflected Guatemala's advantage in water freight rates. The ocean freight advantage of Guatemala over Golfito and Armuelles to the gulf ports was $9.50 per ton, whereas such advantage to the east coast ports was $7.90 per ton or a greater advantage of $1.60 per ton (II 905A).

The lower railroad costs for boxed bananas over shipment of bananas by the stem plus the ocean freight on shipments to the gulf ports instead of to the east coast ports would result in a reduction of about 52¢ per 100 lbs. for Guatemala West bananas. That would reduce the total landed cost per 100 lbs. from Guatemala West to U.S. ports from $4.91 as per the Miller Report to $4.39; adjusting the cost per 100 lbs. to Golfito for the lower cost for ocean freight would reduce the Golfito total cost from $4.64 to $4.36 - practically the same as Guatemala West.

The Miller Report backup data (II 899A) shows that the cost of converting 20,850 existing and rehabilitated acres to Valery would only be $114 per acre while 9,150 acres of new

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* The Court erroneously excluded a document from United's controller which emphasizes the savings by shipping over IRCA in boxes (PX 977 for ident., II 1420A, TR 1764).

land would cost $857 per acre; thus demonstrating that the most efficient use of Tiquisate would have cost, in capital funds, less than $2,400,000 to convert 20,850 acres to Valery. Tiquisate would have ranked first in "New Funds Per Acre" (III 1049A) instead of "Fourth" (III 1046A); that would have also reduced the depreciation and the cost per 100 lbs. significantly, and made Tiquisate more competitive with the other divisions.

Moreover, a more comprehensive study by the Accounting Department in May of 1961, two months after the Miller Report, showed that the landed cost at U.S. east and gulf ports for the Bocas division was $4.43 per 100 lbs. (PX 570, page 7-3) instead of $4.29 in the Miller Report (III 1049A). Thus Bocas, costwise, was being projected at or about Tiquisate, after the above adjustments. New funds per acre for Bocas was $640 (III 1049A) as contrasted with only $114 at Tiquisate on 20,850 acres.

The Court's acceptance of testimony by defendants' witnesses who relied solely on a March 9, 1961 cost analysis (III 1045A) for a final decision made in September 1963 to abandon Tiquisate (I 222A) demonstrates the clear error in the decision below when there are two 1963 studies in evidence (II 753A) and (II 387A) not relied on by Sunderland and Fox, which support plaintiff's position. Both the 1963 studies (II 753A, 387A) were received in evidence on the cross examination of Fox (TR 1746 (PX 1108), TR 1774 (PX 33)) and neither Sunderland nor Fox testified that they relied upon the 1963 studies in making their recommendation to close Tiquisate. Their sole

reliance was the 1961 Miller Report (TR 1764-5).

Reliance on the Miller Report in 1974 by Sunderland and Fox is totally inconsistent with their conduct as evidenced by other contemporaneous documents. Within one month after receipt of the 1961 Miller Report, Sunderland stated: "I agree, and I am sure most people in the Company agree that Tiquisate is potentially one of our best divisions" (II 429A). Fox, in a letter to Sunderland in 1962, after the 1961 Miller Report, stated that Tiquisate built up to 25,000 acres, with new plantings in Cocos and Valery, "could easily become one of the most profitable [divisions] in the Company" (PX 20).

Sunderland testified to the effect that between the Miller Report in March 1961 and his decision to recommend closing Tiquisate in August 1963 nothing occurred to alter his conclusion about the desirability of converting Tiquisate to Valery (TR 742). But that testimony demonstrates that he ignored the 1963 study (II 387A, III 1368A), ignored the "so excellent" results that were being obtained on the Valery trials in Tiquisate (II 917A, 524A) and ignored the fact that the 1961 study assumed the shipment of stems which was inconsistent with his own statement that "boxing" would have a "real significance for Tiquisate" (II 498A).

Moreover, the fact that Sunderland did not rely upon the studies made in 1963, that proved that Guatemala west was competitive with United's other divisions on a landed cost basis, demonstrates objectively that United's purpose was other than business reasons, to wit, "Decisions probably depend on other

factors" than yields (II 524A), such as, anticompetitive reasons including monopolistic reprisal against IRCA for refusing to reduce the rate Ripley held to be fair.

The record (plaintiff's reliance is on contemporaneous records of United in evidence) demonstrates "that the [United] witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared", Aluminum Co. of America, supra, and that is adequate "to reverse a finding" id, 433.

g. The Carpenter Report. The memorandum from Carpenter to Sunderland dated August 6, 1963 (III 1142A-6A) alleged to be in support of the decision to terminate operations at Tiquisate shows on its face that Sunderland had asked Carpenter to state "the reasons for recommending that it [Tiquisate] be phased out of the banana business as quickly as is economically possible." Put simply, the memorandum was prepared not as an objective analysis but to support a decision that had already been made by Sunderland to phase out Tiquisate. Carpenter stated in his covering letter: "I believe it was your intention that this data be furnished the Directors at the September meeting when they will be asked for approval of the elimination of the division." Therefore, the accompanying memorandum was never intended to be a fair balancing of the advantages and disadvantages of Tiquisate as compared with other divisions; it was a one way statement intended to disparage Tiquisate.

The memorandum (III 1144A) is so one-sided that it compares actual costs of Tiquisate boxed fruit, Gros Michel,

for the years 1962 and 1963, of $6.86 per 100 lbs. and $6.30 (estimated), respectively, with expected production costs in 1966 and 1970 for the Valery banana in Honduras and Bocas. That is comparing apples and oranges for the simple reason that Tiquisate was being phased out so that production was down and its unit costs were high (II 501A); its production of Gros Michel was probably based on a production of at most 189 stems per acre (III 1371A), while the Honduras study is based on 400 stems per acre of Valery (III 1365A) for future years when there was large scale production and unit cost was at its lowest. The above comparison is made in an invidious attempt to pull down Tiquisate. This Carpenter study, like a previous one, "was purposely based on very pessimistic assumptions" (II 518A).

The covering letter (III 1142A) states that the report includes "future expectations of the Tiquisate Division in Guatemala" but the memorandum is totally silent on the subject. Proper analysis would have included a projected "Valery" cost for Tiquisate like it had for Bocas and Honduras, but it was not there; it did not even refer to Miller's 1963 study (II 387A).

Another example of the deliberate distortion in the exhibit is the statement that "Another big factor resulting in increased costs was railroad transportation, due to the increase in rates by the IRCA resulting from the loss of the IRCA lawsuit". But counsel for United on oral argument (Doc. No.135, TR 15) stated that the railroad rate was only a "minor factor." In addition, after the rate went to $130 per car, the tropical

cost per 100 lbs. was lower for Tiquisate fruit in 1961*
than in the period 1958 through 1960, which rebuts the
Carpenter memorandum.

Furthermore, that Carpenter report unfairly compares the operations of Tiquisate with United's best division, to wit, Armuelles. Armuelles had been consistently upgraded and production kept at a maximum, while Tiquisate had eliminated practically all of its planting program. In net effect the study unfairly compares an operation being phased out in 1960 through 1962 with the operation at Armuelles at or near its prime operating capacity. As the exhibit states (III 1144A) with respect to Tiquisate, "the reduced acreage and resulting production reduction results in higher overhead costs per unit." As Roddy so appropriately stated with regard to the history of the losses at Tiquisate and Bananera: "The record is of minor importance in considering development of Bananera and Tiquisate divisions as producers of variety bananas" (II 527A), which also rebuts the thrust of a finding that the losses at Tiquisate during the three years prior to the closing were the reason for its liquidation (I 319A, 167(a)).

To further demonstrate the irrelevance of past operating results with the Gros Michel, one need only look at the higher unit cost that was being incurred in Bananera and Bocas as producers of Gros Michel before conversion to Valery as contrasted

* CAG tropical cost delivered aboard ship per 100 pounds for the period 1958-1960 was $4.95, $4.94 and $3.91 respectively even though CAG paid IRCA from $84.61 to $93.08 per car; in 1961 when the rate paid IRCA was $130. per car, CAG's unit cost dropped to $3.72 per 100 pounds (III 942A).

with Guatemala West in the years 1960 and 1961* (II 821A). Yet Bocas and Bananera were both continued under the Valery program. Put simply, one could not judge the future costs of any division as a Valery division by its past history as a Gros Michel division; the respective operations were distinguished by many factors and Valery bananas would be boxed instead of being shipped on a stem basis. The issue is not whether Tiquisate could continued as a Gros Michel** division but whether it could continue as a Valery division under United's <u>new</u> 1963 five-year plan to convert its Central American divisions to Valery fruit. On that point, we have demonstrated above that on the all important landed cost basis, Tiquisate would fit squarely within United's Valery plans.

Plaintiff has demonstrated, based on contemporaneous United documents, that with the "so excellent" yields on Valery at Tiquisate, Sunderland's statement that Tiquisate would produce "beautifully" in the Valery, the favorable landed costs for the Valery from Tiquisate, the full conversion to boxing, the practically zero blowdown experience of the Valery at Tiquisate, then clearly Tiquisate was one of the best United divisions to grow Valery, contra the Court.

h. <u>Tiquisate Was The Only Company Owned Division Closed.</u> The other United divisions, in 1963, that were scheduled for closing were 100% associate producer divisions,

* For Bocas, $7.28 and $8.00 per 100 lbs. in 1960 and 1961 respectively; for Bananera $6.46 and $5.30 per 100 lbs.; for Guatemala West $3.90 and $3.71 (II 821A).

** Finding 172 (I 323A) only reflects the results of operating Tiquisate as a Gros Michel division.

i.e. Santa Marta, Colombia and Manzanilla, Dominican Republic (Cf. II 523A with III 1153A); Nicaragua was the only other division scheduled to be closed (III 1153A) and United purchased bananas there (III 931A, footnote 3).

United's policy with respect to other divisions it closed was also to effectively foreclose such divisions from its competition; e.g. by holding the division (Limon, Quepos and Bluefields) or ceding the land (Truxillo) to the Government (TR 1998-9). Sunderland stated the policy of holding on to inactive divisions in a November 1963 conversation with a competitor (II786A):

> "We have had a number of division that we were very pessimistic about. We have hung on to them. Fortunately we did not sell any facilities. We have kept our docks and ships and railroads and whatnot and those facilities have come back. I don't know. By tomorrow the Dominican may look like the brightest spot in our picture. We have a big investment there. We don't want to compromise the investment in a way that we can't use it if the turn of the wheel brings increased production and so on to the Dominican Republic."

Thus, the breakup and sale of Tiquisate's assets was totally inconsistent with the Company's policy, above stated by Sunderland. It demonstrates that United would have normally held on to Tiquisate, especially since it had all the necessary facilities. As demonstrated, Tiquisate was the only company owned division that was closed.

12. United Required IRCA To Discriminate In Its Rates And Practices In Favor Of United And Against Standard And Other Banana Producers.

a. Discrimination on the line haul banana rate.

In 1933 the basic charge for transporting CAG bananas, from the

west coast of Guatemala to Barrios was fixed by contract at $60 per car and independents were to pay not less than $150 per car (I 131A, B360(b), I 140A, D29-30). In the 1936 contracts, the $60 rate was continued for CAG for a term of 25 years but set up in a so-called "Trackage Rights" and "Operations of Trains" contracts to further conceal the special rates and preferences held by United (I 135A, B373-4). Through its control, United in 1939 required IRCA to establish a public tariff of $130 per car for the line haul (I 141A, D41), which charge continued in effect until 1958 when a wage price and fuel oil differential was added (I 267A, 39); the $130 as so modified (i.e. $134.37 per car in 1960) was paid by Standard Fruit Co. ("Standard") until it terminated its operation in western Guatemala in November, 1961 (II 806A). The CAG rate of $60 was raised to $75 per car in 1948, then to $85 in 1951, and in the 1952-1960 period varied between $84 and $93 per car (II 807A).

Since the <u>Ripley</u> judgment in awarding damages gradually increased the line haul rate until it reached $130 in 1958, United, in net effect, received a discount of over $5,500,000 from the $130 line haul rate on CAG's shipments for the period 1946 to 1958 even <u>after</u> it paid the <u>Ripley</u> judgment and supplemental judgment in March 1961 (computed from II 798A, 802A-1).

Plaintiff is not claiming any discrimination in the rates paid on the <u>line haul</u> after February 16, 1961* (I 226A, 33).

* Contra the Court (I 268A,41), there was competent evidence of the line haul charges to Standard (I 806A, PX 523, I 141A, D41); moreover, finding 41 (I 268A) is inconsistent with finding 39 (I 267A) which referred to some of that competent evidence.

b. Discrimination on the line haul import rate. Plaintiff conceded there was no discrimination on this item in the statutory period (I 209A). As this Court previously stated (I 7A), in the pre-statutory period, "On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF."

Contra the Court (I 292A, 117), plaintiff did offer competent evidence of the public tariff paid by others in the pre-statutory period; it was contained in the agreed computation upon which the Ripley judgment and supplemental judgment were based (II 802A-1, 799A). Even Ripley decreed rates for CAG's imports did not eliminate CAG's rate preference up through 1960 (II 856A-7A ¶8(e)). Moreover, the Court erroneously excluded the Ripley findings which further supported the agreed computation (see I 187A-196A, E1-E25, E29-E35).

c. Discrimination on use of equipment. The Court found that (I 212A) "There is no doubt that CAG was given preferential treatment over Standard in the transportation of bananas from the west coast * * * According to Haase, banana cars were apportioned to CAG on a preferential basis" in the pre-statutory and statutory period.* The Court stated plaintiff was not damaged because the allocation preference in United "never caused Standard to miss a ship or a cutting and that the delay never exceeded 48 hours" (I 213A). However, plaintiff is not claiming "'that IRCA suffered any damages on shipments made by Standard'" (I 212A) but on non shipments of Standard due to the fact that its capacity to ship from western Guatemala was not fully

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* The Court made an inconsistent finding (I 273A, 57).

developed as a result of the equipment preference in United-CAG and IRCA's obligation to carry all CAG bananas tendered (II 666A, ¶1, II 498A, TR 70-1).

A brief history of the equipment arrangement is essential. In 1936, a formal facade was erected in an attempt to justify the low special rates to CAG. The disguise prescribed by United was that it "would appear to be supplying its own cars and locomotives for the movement of its bananas from Western Guatemala, that IRCA would be engaged by contract to operate that equipment for United, and that United would be paying IRCA for the use of IRCA's tracks over which the equipment would move and for the services of IRCA in moving that equipment" (I 132A, B367). "Such appearance of the furnishing of equipment by United was misleading and not a candid statement of fact in that a separate arrangement was made by letter between IRCA and CAG under which IRCA agreed to repay to CAG the cost of the very equipment which United, through CAG, was purportedly furnishing" (I 134A, B369).

"By 1947, with the post-war growth of independent banana shipments and of active Government interest, the United operating officials in Guatemala had become concerned lest the furnishing of equipment by CAG be investigated and found to disclose the payments made by IRCA for such equipment, thus destroying the formal facade erected in 1936; this concern was shared by" IRCA (I 136A, B389). "Accordingly, a revised equipment arrangement was worked out between the United officials and Bradshaw [President of IRCA] so as to supplement and strengthen the appearance that CAG was furnishing the equipment ..."* (I 136A, B390)

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* For an analysis of the change of agreement see B390(a)(b) and B391(a)(b) (I 136A-7A); the fact that legal title to the equipment was in CAG (I 276A, 69) is immaterial.

In addition, a new provision was added to the 1948 contract on equipment which clearly granted CAG-United a preference* on all CAG-IRCA leased equipment; namely, banana cars and locomotives (II 670A). That provision in the 1948 Letter Agreement supplementary to the Contract for Operation of Trains, addressed to CAG, stated (II 670A):

> "It is understood that these locomotives and banana cars are to be used primarily for the banana trains of the Compania Agricola and secondarily for the transportation of the bananas of the United Fruit Comapny, your affiliate. However, whenever these locomotives and banana cars are not required by you for making up your banana trains and when they are not required for transportation of the bananas of the United Fruit Comapny, they are to be at our disposition for use in carrying the freight of the general public."

It is undisputed that the expiration date of the above agreement (II 670A), the operation of trains agreement (II 668A), and trackage rights agreement (II 663A) was January 1, 1968.

Thus the contract preferences granted on banana cars and locomotives, primarily to CAG and secondarily to United, were clearly applicable in the pre-recovery period and continued into the recovery period and were in full force and effect until CAG abandoned Tiquisate. Accordingly, there was a contract between United (CAG) and IRCA requiring IRCA to discriminate that was in existence during the statutory recovery period.** The District Court completely overlooked that discriminatory provision (I 203A, 213A-4A, I 274A, 61).

* The preference to CAG-United on the equipment was in violation of the consent judgment (III 1230A) (Consent Judgment Art. VI, Section (A)(9)) since competitors of United were not accorded terms, privileges and treatment in the transportation of bananas proportionately equal to those accorded by the common carrier (IRCA) to United.

** Shows finding 85 (I 283A) is clearly erroneous.

Therefore, it is immaterial whether United exercised control over IRCA after December 31, 1955 since the effects of United's previous control, through inter alia the preference in the contracts (overlooked by the Court) and practices, continued during the damage period and had not been dissipated by February 16, 1961.

United-CAG's contractual equipment preference was carried out in practice. As Haase testified on cross-examination (TR 339-340):

> "I used as the bible contracts insofar as I knew them, and they were explained to me and how I was to carry them out. As I understand it, when the Compania Agricola ordered bananas moved, we were to take care of those with preference.
>
> * * * *
>
> "Now, when the Compania Agricola had daily cuts and large cuts, our power and cars in some instances became exhausted insofar as quantity is concerned, and, if the Standard Fruit Company ordered cars for cutting we naturally supplied the requests of Compania Agricola in preference to the Standard Fruit Company. If there was any power or cars left over, then they were given to Standard."
>
> Q. "Yes. But are you talking about the CAG banana cars or are you talking about other kinds of cars ?
>
> A. "CAG locomotives, CAG banana cars, IRCA locomotives, IRCA banana cars, stock cars, box cars, whatever it was necessary to use at that time.

United-CAG had a preference in eastern Guatemala on the IRCA-owned banana equipment (TR 64-72, 351), and CAG primarily and United secondarily (II 670A) had a preference on all the equipment leased by CAG to IRCA; the combined preferences permitted CAG-United to preempt all the banana cars IRCA either owned or

leased* (TR 413-4). Said practice by IRCA continued during the year 1961 (TR 70-2) which was the last year for Standard's operation in western Guatemala.

It would have been economic suicide for Standard to expand its production in western Guatemala without United's specific approval as to the extent of the expansion. Through the equpment preference, United controlled the availability of equipment to Standard. United thus had economic control over the banana movement from the west coast of Guatemala via IRCA to Barrios - that spelled trade restraint and monopoly.

Haase, President of IRCA, in 1959, anticipating a car shortage due to increased production from Standard, United and CAG, asked McGovern, Chairman of IRCA's Board and general attorney of United, to have United return 100 banana cars that had been shipped to Panama in 1956 (II 445A); that request was refused.** Thus, it was clear from an operating standpoint, that Standard's capacity to ship was thus limited by United's refusal to return the 100 banana cars.

The IRCA Board, in March of 1956, decided that it would not purchase the 100 banana cars United intended to ship to

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* IRCA had 527 banana cars and 47 locomotives (PX 865) under lease from CAG (II 670A). IRCA owned 348 banana cars (not used for western Guatemala bananas on a regular basis because of their age (TR 65, 116-7)) and 47 locomotives (TR 59). The preference in CAG-United also applied to the locomotives and diesels (II 670A, TR 339-341).

** Defendants conceded the point (DB 61). Haase, in 1959, stated (II 445A):

> "The I.R.C.A. fruit cars available will barely take care of Fruit Company and Standard Fruit Company shipments and C.A.G. cars available will barely cover their requirements. These calculations are based on <u>good</u> oeprating conditions, no undue delays account accidents, irregularities in ships' schedules, man failures, etc., all of which do and will occur." (original emphasis).

Panama (I 276A, 69(b)); it thus carried out United's policy.*
That action was taken before Referee Hammer's decision in Ripley; it was recommended by Thomas Bradshaw, IRCA's President (III 1299A) who was still under United's control and domination, as found in Ripley.** In fact, United's withdrawal of 100 banana cars from Guatemala in 1956 reflects United's initial reprisal against IRCA, namely, to restrict its production and shipment over IRCA.

CAG's position that it would be relatively less expensive to "dead head" crews to the West Coast plantations rather than to bring back the 100 cars and reinstall the air brake equipment (I 293A, 121) demonstrates that CAG was thinking of its own short run restricted program for Tiquisate and not a long-range plan for IRCA that would encourage and permit greater production by Standard.

A 1960 letter (III 1189A) from Haase to McGovern demonstrates that United's refusal in 1959 to bring back 100 banana cars to Guatemala did create a tight supply of banana cars in service.

Moreover, IRCA under its agreements with United and CAG was required to carry all bananas tendered by CAG from western Guatemala to Barrios at least to the extent of using all its CAG leased equipment***(II 666A, ¶1, II 498A, TR 70-1).

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* Contra finding 120(a) and (b) (I 293A), United's policy was to ship 100 banana cars to Panama (III 1298A-9A) and that policy was carried out by the IRCA board.

** While the Ripley findings were held to be binding as of December 31, 1955, there was no material change through March of 1956.

*** The Court erred when it said there was no such requirement in the 1948 contracts (I 275A, 67); moreover, it was inconsistent with its earlier decision that there was such a requirement (I 46A). In fact, defendants conceded the existence of the 1948 requirement (REPFF 83).

d. Discrimination on Wharfage Charges For Bananas. The Court found that before and after 1961 Standard paid IRCA $3 per ton ($36 per 12 ton banana car) plus a fee computed from the cost of IRCA's loading crews for the operation at the Barrios pier of unloading the cars and loading aboard ship (I 206A). CAG, before and after 1961, used its own labor to unload its cars and load aboard ship and paid no wharfage charges to IRCA (I 206A). IRCA owned the Barrios wharf (TR 81).

The Court found (I 206A-7A) "plaintiff has failed to prove that it did not cost CAG as much to load and unload as the charge paid by Standard to IRCA for handling these operations." But inconsistently the Court assumed later (I 208A-9A) that plaintiff did prove that Standard's banana loading expense at Barrios was, at least, $46 per car, which it paid to IRCA, while United's cost by use of it's own labor, was $34.04 per car (I 208). Moreover, the Court (TR 2035) erroneously excluded PX 579 for ident. (III 1401A-2A) which is a United document from its files; it shows that the pier charges to Standard were approximately $48 per car greater than United's cost.*

* That erroneously excluded document (III 1401A-2A) shows that the manager of United's Guatemala division, based on copies of IRCA invoices to Standard for loading fruit at Barrios, admitted that in June 1961 IRCA charged Standard $83.25 per car (249 stems) for switching and loading (the "Bonita") at Barrios; the $83.25 per car included $28.01 for wharfage or switching and $55.24 for labor and surcharges for loading aboard ship. In contrast, United's comparable cost during 1961 was $35.36 per car (249 stems), including salaries, stevedoring, conveyor maintenance, cleaning wharf, etc. United thus had a $47,89 per car average over Standard on the Barrios pier during the statutory recovery period.

United's own statistics show that during 1961 it had at least a 35% advantage on the Barrios pier over Standard, to wit, United's so-called "banana loading expense" of $34.04 per car (III 1285A, 1208A) compared to the $46 per car (at least) IRCA charge to Standard (I 208A, $36 per car wharfage plus at least $10 for loading aboard ship (TR 424)).

The Court erroneously excluded certain Ripley findings. Those excluded Ripley findings show that the "CAG contract charge included such terminal services as the use of IRCA's Barrios wharf for unloading bananas from the cars and for loading them aboard ship, switching of loaded cars onto the wharf, and switching the emptied cars off the wharf" (I 164A, D70); those and "other services on the wharf were covered by separate charges" to independents (I 164A-5A, D71).

"The $3 per ton wharfage charge on bananas applies in part to the use of the pier at Barrios.*" (I 166A, D83); that excluded Ripley finding is directly contrary to the Court's finding that the $3 per ton charge "was essentially a loading and unloading charge rather than a separate charge for the use of the pier ..." (I 208A). The Ripley finding (D83) is buttressed by other excluded Ripley findings: "The difference in cost to IRCA of the service to independents and to CAG, at Barrios (except for various labor costs on which IRCA makes separate charges to independents and which CAG performs for its own account) is insignificant" (I 165A, D72); "The wharfage charge of $3 per ton on bananas was a fair charge" (I 166A, D83); "The profits IRCA made on the $3 per ton wharfage charge were fair" (I 166A, D84). (Also see excluded Ripley findings D87-D94, D99, I 166A-7A, 169A).

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* TR 73-4;IRCA made a profit on the $3 per ton charge.

Standard on at least three separate occasions requested that it be given the same rights on the pier as United but IRCA never consented (III 1300A, 1306A, 1067A). That request from Standard was undoubtedly based in part on the fact that "United has directly supervised the controlled labor gangs on the pier at Puerto Barrios, including labor handling the non-United business of IRCA" (I 150A, B293); that Ripley finding was erroneously excluded by the Court.

Contra the Court (I 207A) the IRCA Board resolution of July 2, 1957 re elimination of wharfage and switching charges to Standard was never carried out because it was "subject, of course, to consideration of the Referee's decision in the Ripley case" (III 1300A) and thereafter, IRCA took the position on the Ripley appeal "that United, as a fiduciary, should have paid at least the rates paid by the general public* ...", to wit, $3 per ton for wharfage, inter alia.

The Court stated that there is "no proof that Standard was arbitrarily denied, at the behest of CAG, the right to use its own labor in the process" (I 207A). But that misstated the issue. The charge to Standard was a fair charge; United should have paid it.

The Court stated there is no evidence that "UF had anything to do with the decision [in March 1961], whatever it may have been" (I 207A). But the IRCA annual meeting was to be held in May and United still held its IRCA stock. The directors of IRCA remembered that in 1958 United announced that it would not vote its stock and when an independent slate attempted to be elected

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* IRCA's main brief in Appellate Division, July 3, 1958, p.7 and its Reply Brief (p.5): "The Referee properly found that ... a wharfage charge of $3 per ton on bananas was a fair charge."

and take control, United reneged and voted its stock and elected the directors it wanted (PX 1378). That critical fact was overlooked by the Court.*

The Court in its opinion (I 235A) refers to the fact that plaintiff never called anyone from Standard as a witness, but when United-Standard correspondence was offered in evidence, it inconsistently sustained the objection** on the ground that it was not going to get into any horizontal conspiracy in this case (TR 1049-50).

There was nothing in the Ripley judgment (I 277A, 71) that barred United from eliminating its rate preference on the Barrios pier by paying IRCA the same charges that Standard paid.

e. Discrimination in Practices And Services At The Pier.

The facts are that United had exclusive use of the north side of the pier, "where the water was several feet deeper and could accomodate larger vessels" (I 212A) and where United had four large gantry conveyors (TR 114-5) for "loading and unloading its ships" (I 211A). Standard "used the south side of the pier where it had placed its conveyors on an apron" (I 211A). The Court justified United's preference on the north side by the statement "UF had installed

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* On the issue of control, the Court also overlooked the fact that until McGovern's death on February 16, 1961, Haase, the President of IRCA, reported to McGovern, Chairman of the IRCA Board, as his superior (TR 45).

** Even though meetings and communications between United and Standard were conceded by Sunderland to be in violation of the Consent Decree (TR 836-7), Sunderland met with Standard's president prior to February, 1961 (III 1425A, PX 1104 for ident., TR 1048). Later, the President of Standard told Sunderland in a letter also erroneously excluded (III 1424A-1424A-1, PX 1096 for ident., TR 1049-50) "I have always felt that frank discussions of the many problems that confront our companies help us both to accomplish more. Put simply, I feel that our business is the roughest that exists, and knowing the general direction that your competitor is taking at least alleviates one of the many headaches we encounter in our day-to-day operations." Sunderland's response, also

(footnote continued on next page)

its conveyors on the north side of the pier <u>many years before Standard came to Guatemala</u>" (I 211A). The Court, in effect, was allowing a monopolist to insulate its monopoly on the ground its preference was first. That preference in United was inconsistent with IRCA's status as a common carrier and contrary to the antitrust laws. Moreover, that installation was made while United controlled IRCA.

To demonstrate the importance of United's preferential berthing at the Barrios pier, the documentary evidence (PX 797) shows that when United was considering the feasibility of shipping Tiquisate fruit through the port of Acajutla, El Salvador, Sunderland was advised that "there would be lost time of ships due to <u>inability to obtain preferential berth</u> and <u>the cost of this can not be calculated.</u>" Thus any potential shipper of Guatemalan fruit would, on examination of United's almost exclusive use on the north side of the Barrios pier and Standard's use of the apron on the south side, conclude as United did on the Acajutla port.

Furthermore, it is no answer to a per se preference for the Court to state (I 212A) that there is no evidence that Standard ever asked for the privilege of using the north side of the pier or that its ships "were too small for its purposes." That is immaterial because Standard was forced to operate in a mold that had been cast by its competitor and thus placed in an inferior competitive position.

The fact that this preference in United over Standard was

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* (footnote continued from prior page) erroneously excluded (III 1423A, PX 1095 for ident., TR 1049-50) was: "I share your view that it would be useful and pleasant to have a discussion about the future of the banana business and I will try to call you the next time I am anywhere near New Orleans."

only for (I 211A) "the nine months during the statutory recovery period" as stated by the Court shows that the Court failed to appreciate the full economic impact of this preference in United in the pre-statutory period and also as a significant factor in Standard's decision to terminate its operations in Guatemala. Furthermore, it foreclosed other competitors from coming into Guatemala during the pre-recovery and recovery period.

The wharfage preference was an exclusionary weapon; it, per se, spelled economic disadvantage for all of United's competitors. This was especially so since the unloading of trains had to be coordinated with loading aboard ship. Moreover, limiting the size of Standard's vessels, was the result of confining Standard to use of the shallower side of the pier; this meant a restriction on coordination of the loading with Standard's operations in Honduras and Costa Rica - east. The Court also erroneously excluded pertinent findings from Ripley (I 150A, B288-B293, B295; I 165A-7A, D70-D89).

f. Total Banana Transportation Costs. The Court accepted plaintiff's proof that Standard's banana loading expense at Barrios, was, at least, $46.00 per car which it paid to IRCA while United's cost, by use of its own labor, was $34.04 per car (I 208), which meant that Standard was at a 35% disadvantage, at least, on the Barrios pier.

Contra the Court (I 208A-9A), United's witness only guessed (TR 1466) that "IRCA rendered 'spotting services' to Standard" on its banana farms. IRCA did the spotting for CAG (TR 410), contra the Court (I 209A). The Court* also erroneously excluded Ripley finding D69 (I 164A).

* Furthermore, contra the Court (I 209A), the net difference in mileage for Standard's plantations and CAG's was not 70 miles each way but 20 to 30 miles (TR 421-2).

Argument

PART ONE - UNITED'S ANTITRUST VIOLATIONS VICTIMIZING IRCA

Point I

UNITED, THE MONOPOLIST, CARRIED OUT ITS THREAT TO ABANDON TIQUISATE WHEN IRCA REFUSED TO LOWER ITS RIPLEY DECREED FAIR RATE OF $130 PER CAR - THAT WAS AN ABUSE OF MONOPOLY POWER OR A MONOPOLISTIC REFUSAL TO DEAL OR BOYCOTT TO MAINTAIN UNITED'S MONOPOLY OR TO FORECLOSE COMPETITION; UNITED ALSO ACTED IN CONCERT WITH CAG.

§2 of the Sherman Act (15 U.S.C.A. §2) provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce ... with foreign nations, shall be deemed guilty of a misdemeanor". Three separate prohibitions are stated: (1) monopolizing (2) attempt to monopolize and (3) combination or conspiracy to monopolize - each with respect to "any part" of the commerce, in this case, foreign commerce,* of the United States. The combination or conspiracy aspect is discussed below under §1

* The commerce element may be satisfied by showing either that the activity is "in commerce" or that it "affects" commerce. Lieberthal v. North Country Lanes, 332 F2d 269 (C.A.2). Since the District Court assumed, arguendo, in favor of the plaintiff "that IRCA, the acquired company, was 'engaged in commerce' under Section 7 of the Clayton Act" (I 250A, ftn. 13), it must have implicitly assumed that the IRCA leg of the total "transport" service in the carrying of bananas from Guatemala to the United States is "in" our foreign commerce. Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 , (Dec. 17, 1974), or in any event, that leg "affects" our foreign commerce in banana imports. For the above reason, we do not discuss the other authorities that support plaintiff's position.

of the Sherman Act. We do not believe it necessary to discuss the three prohibitions separately because United's conduct constituted monopolization and a fortiori an attempt, as well as, a combination or conspiracy, to monopolize. In fact, the District Court assumed that United had a monopoly (I 224A). It found that United-CAG "exported most or all of the bananas sent to the United States from Guatemala" (I 254A, 6). The Court further assumed "that the relevant market for purposes of Section 2 of the Sherman Act is the importation of bananas into the United States solely from Guatemala" (215A) and "is the 'service of transportation of bananas from the western side of Guatemala to Puerto Barrios on the Atlantic side for shipment to the United States'" (I 250A, ftn. 13). The Court also found that "... IRCA has been the only practical means of moving bananas in volume from the growing areas of Guatemala to Puerto Barrios ..." (I 225A, 7).

IRCA was the bottleneck for bananas from Guatemala-West to the United States. United's control over, and its contracts with IRCA gave United an anticompetitive hold on that bottleneck. United used IRCA as its instrument for foreclosing, restricting, and suppressing competition by means of its rate and service preferences, which were tantamount to outright refusal to deal by IRCA. For example, IRCA,pre and post 1961, in addition to the rate and service discriminations granted United, was obligated until December 31, 1967 to grant CAG a preference on all the IRCA

equipment leased from CAG* and to carry all bananas tendered by CAG, regardless of volume. Accordingly, United-CAG at any time could effectively ship sufficient volume to foreclose others. Because of the IRCA-United contracts, United's control and monopolization, IRCA was reduced to a state of vassalage, and the growth of an independent banana traffic was restricted to Standard Fruit and otherwise foreclosed. Thus, United used IRCA as its tool in building its monopoly in Guatemala, which continued during the recovery period.

As the Supreme Court stated, per Holmes, J., for a unanimous court, in Swift & Co. v. U.S., 196 U.S. 375, 402, in finding §§1 and 2 Sherman Act violations:

> "It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation."

Our case is *a fortiori*, where the advantage went beyond a cost advantage; namesly, serious service discriminations amounting to outright refusals to serve.

In Standard Oil Co. v. U.S., 221 U.S. 1, 76, the Supreme Court found §§1 and 2 Sherman Act violations in that "means of transportation were absorbed and brought under control." And with reference to United's exacting from IRCA contracts by which IRCA was compelled to and did exclude United's competitors, through various devices including prohibitive rate, equipment preference and service discriminations, the following holding of Standard Oil Co. is particularly pertinent:

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* The Court found as a fact that CAG was given "preferential treatment over Standard in the transportation of bananas from the west coast" including apportioning banana cars. (I 212A).

"freedom to contract [...] the essence of freedom from undue restraint on the right to contract" (id., at 62).

United's control and domination of IRCA were exercised so to prevent IRCA from freely contracting with United and with United's competitors. Such control and domination and the United contracts coerced thereby were of the essence of undue restraint and monopolization.

The Supreme Court held, further, that the common stock control through Standard Oil of New Jersey violated §§1 and 2 of the Sherman Act (id., p.74). This applies squarely to United's stock control of, and contracts exacted thereby from IRCA.

U.S. v. Reading Co., 253 U.S. 26, was an action to dissolve a combination as unlawful under §§1 and 2 of the Sherman Act. Reading Coal Co., the largest in the Schuylkill anthracite field, and Reading RR., over which the former shipped coal, were both acquired by a Holding Co. The Supreme Court, referring to this Holding Co. and its board of directors, held as follows:

> "This board of directors, obviously, thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act." (id.,at 48)

This holding is squarely applicable to our case. By acquiring control over IRCA and exacting the contractual arrangements with

IRCA, United obtained "dominating power" over the sole practicable means of transporting Guatemalan export bananas and other export or import commodities through Puerto Barrios, with power to exclude competing shippers. That

> "dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." (*id.*, 57)

Such "a power, so obtained, regardless of the use made of it, constitutes a menace to and undue restraint upon interstate commerce, within the meaning of the Antitrust Act." (*id.*) *A fortiori*, such power is illegal where, as here, United intended to, and did in fact, use it to restrain IRCA and exclude competitors and thereby monopolize the import commerce of the United States in Guatemalan bananas.

It was in the factual setting set forth above that United-CAG, seeking to defeat *Ripley*, demanded a reduction below the court-determined fair rate of $130 and threatened to cut off all banana shipments from Tiquisate unless IRCA complied.* When

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* The Court found that United officials, before and after February 16, 1961 stated to IRCA "that unless the *Ripley* judgment required rate of $130 per banana carload was reduced to $90, the Tiquisate operations might have to be liquidated. IRCA refused to reduce the $130 *Ripley*-decreed rate" (I 325A, 177-178 and I 217A). United's counsel, on its second motion for summary judgment in this litigation (Doc. No.73 ,TR 79, 3/7/73) conceded:

> "United, incidentally, made no secret during the course of the [*Ripley*] litigation of its intention to cut down or go out of business. It stated in the Court of Appeals, for example, that it would be compelled if the present judgment were to stand to consider closing down or reducing that development, rather than continuing to pay the increase."

United's threat was carried out by the restriction of its shipments and then the abandonment of Tiquisate.

IRCA refused to depart from the rate which Ripley had fixed as fair, United carried out its threat, abandoned Tiquisate and eliminated its own shipments and also foreclosed the substitution of other, independent banana traffic, knowing that that rang the death knell for IRCA. This was, therefore, a monopolist's refusal to deal or boycott as a means of United's maintaining its monopoly or foreclosing competition and is accordingly, a per se violation of the Sherman Act.

To abuse monopoly power by putting a price squeeze on those the monopolist deals with is itself a violation of §2, U.S. v. Aluminum Co. of Amer., 148 F2d. 416, 438 (C.A.2), as is "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor",* U.S. v. Griffith Amusement Co., 334 U.S. 100, 107, as is a refusal to deal to obtain or maintain monopoly power, Eastman Kodak Co. v. Southern Material Co., 273 U.S. 359; Lorain Journal v. U.S., 342 U.S. 143.

In Continental Ore Co., v. Union Carbide & Carbon Corp., 370 U.S. 690 the Supreme Court held violative of the Sherman Act a monopolist's * elimination of the plaintiff's independent suppliers (698-700) and a conspiracy between parent and subsidiary to effect purchasing that was "discrimnatory" as between plaintiff and defendant (706, 707).

It is illegal per se to use even a legal monopoly

* In Banana Distributors v. United Fruit Co., 162 F.Supp. 32, 37 (S.D.N.Y.), revd on other grounds, 269 F2d 790 (C.A.2) the court held illegal a monopolist's influencing of prices.

position, beyond the protected monopoly, "to foreclose competitors from any substantial market" Intl Salt Co., Inc. v. U.S., 332 U.S. 392, 396; in Otter Tail v. U.S., 410 U.S. 366, 377, a lawful, regulated monopoly used its dominance in the transmission of power to stifle competition in the retail area by refusing to deal; held "Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act." A fortiori it is illegal to use an unlawful monopoly position as did United vis-a-vis IRCA to put a price squeeze on it or refuse to ship.

Concerted boycotts are, of course, illegal per se. Klor's v. Broadway-Hale Stores, 359 U.S. 207; Northern Pacific Ry. v. U.S., 356 U.S. 1, 5; Warner & Co. v. Black & Decker Mfg. Co., 277 F2d 787 (C.A.2). In Warner & Co., supra, this Court reversed the district court and held the complaint stated a cause of action under §1 of the Sherman Act where defendant supplier, in a conspiracy, threatened to terminate plaintiff's distributorship and price discount unless plaintiff withdrew its bid or revised it to meet defendant's fixed price and when plaintiff refused, defendant carried out its threat. Our case is a fortioti, since United was a monopoly seeking to maintain its monopoly or to foreclose competition but, in any event, United-CAG acted in concert in violation of §1 as in Warner & Co.. In Klor's, supra, the Supreme Court, explaining why a boycott is illegal per se, stated that it deprives the plaintiff of its freedom to trade in an open market and "drives it out of business as a dealer in defendants' products" (213) and stated (212):

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category [citing cases]. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' Fashion Originators Guild v. Federal Trade Comm'n, 312 U.S. 457, 466, 467-8. Cf. United States v. Trenton Potteries Co., 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned."

This applies squarely to the United-CAG boycott of IRCA. Arguendo, United's alleged "legitimate business motives" even though "reasonable in the specific circumstances"does "not" save the violations of the antitrust laws. Also see Sanib v. United Fruit Co., 135 F. Supp. 764 (boycott of plaintiff by United and its subsidiary).

The learned District Court failed to apply the correct legal standard of conduct applicable to monopolists and overlooked the violation of "abuse" or "misuse of monopoly power" in applying a price squeeze on a supplier of transportation service. It erroneously treated the negotiation betwen United and IRCA as though it were between two equals bargaining at arms length (I 218A).

In United States v. Griffith, 334 U.S. 100, 101, the Supreme Court held that a man with a monopoly of theatres in any one town is not permitted to use that "strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors." Likewise, United here was using its "monopoly

power" in Guatemala "as a trade weapon against" IRCA to beat down IRCA's fair rate.

In Griffith, supra, the Supreme Court held (108):

> "Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. United States v. Patten, supra, p.543 ."

The Supreme Court in Griffith looked to the effect of joining a "threat to withhold" and a separate request for exclusive film rights in a different town and held: "he is using monopoly power to expand his empire." The facts in our case are a fortiori since the "threat to withhold" United's business in western Guatemala by way of abandonment was expressly coupled with United's request for a reduction in rates from IRCA. United's threat to abandon also carried with it the implicit threat that United would make certain that its competitors would not purchase Tiquisate and replace it as a shipper of bananas over IRCA, otherwise United's threat would have lacked substance.

Thus, here, as in Griffith, even if we assume absence of a specific intent to foreclose competitors from coming into Tiquisate or to maintain its monopoly, nonetheless United "is

chargeable in legal contemplation with that purpose" since the end result of foreclosure of competitors or maintaining its monopoly is the "necessary and direct consequence" of what United did, to wit, abandoning Tiquisate and selling off the land piecemeal to former employees and others for growing cotton.

In Griffith, the Supreme Court stated (108):

> "The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act. If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed."

Thus the Supreme Court makes it clear that whether monopolist United, by itself, threatened abandonment to exact from IRCA a price lower than the fair price or whether it joined with another banana shipper, like Standard, "It is in either case a misuse of monopoly power under the Shermn Act."

Hypothetically, if United and Standard Fruit conspired to and did threaten IRCA that unless it reduced the $130 line haul rate, they would abandon their operations in Guatemala, that would be a conspiracy in restraint of trade and a per se violation of §§1 and 2 of the Sherman Act under Klor's, supra; Mandeville Farms v. Sugar Co.,* 334 U.S. 219; U.S. v. Parke, Davis

* There the Supreme Court sustained a complaint alleging violation of §§1 and 2 of the Sherman Act based on a conspiracy of California sugar refiners to fix the prices they would pay for sugar beets grown in California.

& Co., 362 U.S. 29; Warner v. Black & Decker, 277 F2d 787 (C.A.2); Steiner v. 20th Century Fox Film Corp., 232 F2d 190 (C.A.9). The Court in that hypothetical, as a matter of law, would reject any attempted justification or business excuse by United and Standard for violating §§1 and 2, i.e. that they were motivated by "legitimate business reasons" as found by the District Court here (I 219A) based on a claim that it was better to grow bananas in other divisions. See Fashion Guild v. Trade Comm'n, 312 U.S. 457, 468.

To further demonstrate that a threat carried out by United as a monopolist has the same legal consequences, at least, as a threat carried out by the United-Standard hypothetical conspiracy, this Court in Aluminum Co. of America, supra, stated (427-428):

> "Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did - that is, as soon as it began to sell at all - it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies."

Thus, it was clearly a per se violation for United to threaten IRCA with abandonment in order to have it lower its

$130 per car charge, and when IRCA refused, to do so. "Indeed, it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies." United the monopolist had "entire control" to itself and even greater power to fix prices than any conspiracy between United-Standared which would only be "partial monopolies", thereby demonstrating the legal standard that the District Court should have, but erroneously failed to,apply here.

This Court in U.S. v. Aluminum Co. of America, supra, also stated (428): "a monopoly is always an 'unreasonable restraint of trade.'" Add that to the fact that §1 violations are generally committed for the purpose of becoming a monopoly. Certainly then the legal standard of prohibitions applicable to a monopolist is stronger medicine than that applicable to a conspiracy under §1. A fortiori, United, a monopolist, under §2, could not do to IRCA, as a matter of law, what a conspiracy could not do under §1. Putting it affirmatively, if a conspiracy between United and Standard is not permitted to beat down IRCA's charge for transportation services in Guatemala under a threat, carried out, of abandonment without responding in damages, then United, a monopolist, could not do the same without violating §2 and responding in damages. In both cases, the business excuse or justification of better operating conditions in other divisions is immaterial. We may note, in this connection, that §§1 and 2 are intended to be construed together to avoid loopholes, as they, per the Supreme Court in U.S. v. Amer. Tobacco Co., 221 U.S. 106, 181:

> "when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

Griffith also held (107): "For §2 of the Act is aimed, *inter alia*, at the acquisition or *retention* of effective market control." United, in exercising its monopoly power here against IRCA, was attempting to retain effective market control over Guatemala and Central America.

To fully appreciate why a monopolist cannot abuse his economic power gained through his monopoly, we turn to *Aluminum Co. of America*, *supra*, where this Court (L. Hand, J.) stated (428):

> "There can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition."

Here, United, having built itself up to monopoly status in Guatemala by foreclosure and restriction of competition, left IRCA exposed to United's monopolistic bargaining power. Thus United was barred from abusingits monopoly power against IRCA. But the District Court erroneously overlooked the applicable legal theory of misuse or abuse of monopoly power. It held (I 223A):

> "One must conclude that in seeking a lower rate for banana shipments, UF was not seeking a rate that was discriminatory, for there was no longer any actual competitor to discriminate against."

The assumption of that ruling is to give United the monopolist the spoils that result from its having unlawfully eliminated

<u>competition in Guatemala, to wit, now that it has successfully foreclosed competition in Guatemala by its predatory conduct, United may exercise its monopoly power to obtain an unfair price from IRCA because that new unfair price will not be discriminatory.</u> That erroneous ruling violates the classic equitable principle that a wrongdoer may not benefit from his own wrong. Furthermore, said holding is directly contra to the Supreme Court's statement in <u>Griffith</u>; <u>supra</u>, 108:

> "If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed."

Since a conspiracy to drive down the price paid to suppliers, <u>Mandeville</u>, <u>supra</u>, is outlawed, then United-CAG acting in concert, fall within the prohibition of §§1 and 2, <u>Continental Ore Co.</u>, <u>supra</u>; <u>Sanib</u>, <u>supra</u>.

In <u>Fashion Guild</u> v. <u>Trade Comm'n</u>, <u>supra</u>, at 468, the Supreme Court affirmed the holding that defendants violations of §§1 and 2 could not be excused as a matter of law and stated:

> "Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."

Likewise here, United's alleged legitimate business motive in switching their banana business to different divisions should have been rejected as a matter of law when plaintiff established that United abused its monopoly power, by unlawful threats, carried out. In discussing <u>Fashion Guild</u>, this Court in

Aluminum Co. of America stated (428):

> "All such evidence the Commission refused to hear, raising as sharply as possible the issue whether the combination could excuse itself as 'reasonable' because of the benefits it conferred upon the industry. The court sustained the Commission because 'the purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition."

Here, monopolist United's alleged "reasonable" business motives, as a matter of law, do not "excuse itself" because its conduct was "within the policy of the prohibition" of §§1 and 2 of the Sherman Act. Therefore, the District Court erred as a matter of law in accepting United's excuse of "legitimate business reasons" for its violations of §§1 and 2.

As the Court stated (445) in Aluminum Co. of America, with reference to the Supreme Court's holding in United States v. Socony-Vacuum Oil Co., 310 U.S. 150:

> "An agreement to withdraw any substantial part of the supply from a market would, if carried out, have some affect upon prices, and was as unlawful as an agreement expressly to fix prices."

Thus here the monopolist's threat, carried out, to withhold its western Guatemalan banana shipments from the market was unlawful per se.

In Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F2d 484 (C.A.1), a monopolist - the building owner - excluded plaintiff from the fruit and produce building, of particular advantage to plaintiff and others in that business. The Court

of Appeals for the First Circuit (per Judge Clark of the Second Circuit sitting by designation) held (at 487): "To impose upon plaintiff the additional expenses of developing another site ... is clearly to extract a monopolist's advantage. [citation]. The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones [citations]". By analogy, here, to impose upon potential competition coming into western Guatemala the "additional expenses of developing another site ..." other than Tiquisate "is clearly to extract a monopolist's advantage." Thus Tiquisate itself was an old market and United should have either stayed there or not foreclosed potential competition from taking it over. By foreclosing Tiquisate, United, the monopolist, was denying entry to an old market. Gamco rejected the same defense that was accepted by the District Court, to wit, there, that there were other sites available and here, that there was plenty of other land in western Guatemala for growing bananas.

It may be noted that United did not go out of business and does not seek to defend on any such ground. United continued in business, simply shifting its operations to other areas. Closing down one division - and keeping it out of the hands of a competitor - is no more immune under the antitrust laws than, for example, the familiar sharing of territories under which each party to the agreement gives up operations in all territories except the one reserved to him. In Zenith*, the conspirators confined Canadian sales to Canadian manufacture, thereby abdicating such business for their American plants. In fact, every monopolistic

* Zenith Radio Corp. v. Hazeltine Research, 402 U.S. 321

refusal to sell is pro tanto a giving up of business. The essence of the violation is intended or otherwise unreasonable restraint of trade or monopolization as e.g. by exclusion of actual or potential competition (U.S. v. Amer. Tobacco, 221 U.S. 106; 1 Von Kalinowski, Antitrust Laws & Trade Regulation, §8.02[1], pp. 8-10); the means or other motives - no matter how otherwise lawful or even laudatory - confer no immunity; e.g. to keep prices reasonable U.S. v. Trenton Potteries, 273 U.S. 392 or to stamp out the evil of "style piracy", Fashion Originators' Guild v. F.T.C., 312 U.S. 457, or to attract business to a city, Hilton Hotels Corp. v. U.S., 467 F2d 1000 (C.A.9).*

Plaintiff thus established as a matter of law that United abused its monopoly power by threatening and then abandoning Tiquisate because IRCA refused to reduce the $130 line haul rate held to be fair in Ripley.

Plaintiff proved that a substantial motive in United's refusal to deal with, or boycott of, IRCA was to maintain its monopoly in Guatemala or Central America, or to attempt to monopolize the United States market or to foreclose competition at Tiquisate.**

After United abandoned Tiquisate in 1964, it removed

* Amer. Tobacco Co. v. U.S., 328 U.S. 781, 809: Acts "in themselves wholly innocent", when "part of the sum of the acts which are relied upon to effectuate the conspiracy come within its prohibition."

** In Vines v. General Outdoor Advertising Co., Inc., 171 F2d 487, 491 (C.A.2) seller contractually reserved the right not to deal but that did not give defendant immunity for refusal to deal in furtherance of an antitrust violation.

the irrigation equipment from Tiquisate (II 427A, 432A) and picked up 90 miles of tracks at Tiquisate (TR 372-4), thus making certain that the lands would be used for some purpose other than growing bananas. The irrigation equipment was essential to the growing of bananas. Its removal sounded the death-knell for banana production on such lands. After United abandoned Tiquisate, it continued to ship bananas from eastern Guatemala, via IRCA, to the United States. It was the only shipper and had 100% of the market.

United also maintained a monopoly over the importation of bananas into the United States solely from countries in Central America. Central America was a separate relevant market. From 1954 through 1964, United's share of the market for imports <u>from Central America</u> through United States ports was betwen 70% and 82%. Thus United had a clearcut monopoly in that 1954 to 1964 period over Central America as a source of supply for the United States market.

The Court found (I 302A, 139) that the phaseout of Tiquisate was part of the plan adopted by United in September of 1963, to eliminate United's purchases in Ecuador by 1965 and to concentrate 100% of its supply in Central America and thus to rely on high production from the Valery and the Central America ocean freight advantage over Ecuador. Clearly, phasing out Tiquisate and not selling it to competitors, was part of United's planned strengthening of its monopoly position in Central America. In the period 1962 through 1964, United's share of the Central American supply was 70% to 71%. As a result of its 1963 five-

year plan, its share of Central America increased to 76% in 1965-1966 and 75% in 1967, then declined to 68% in 1968. Thus United successfully maintained its monopoly over the Central America source of supply for the United States market.

United's strategy was simple; use its monopoly position in Central America to beat the independents from Ecuador and thus, to monopolize the United States market. This also worked. In the period 1964 to 1968, the independents' imports into the United States dropped by 10 million stems, almost in half, from 22 million stems to 11.9 million stems. In that same period, United's stems to the United States from Central America increased by over 50%, to wit, by 11.7 million stems from 19.5 million to 31.2 million. As a result, Central America's share of the United States market increased from 63% in 1965 to 70% in 1966, 73% in 1967 and 80% in 1968.

A critical element in the success of that plan was to foreclose competitors from Tiquisate. As Sunderland and Fox told Chalk, 4,000,000 stems of the Valery could be produced on only 10,000 acres at Tiquisate, which meant 8,000,000 stems on 20,000 acres; United told Chalk it could produce 9 million stems* (II 399A). United's Division of Tropical Research concluded that the yields at Tiquisate were "so excellent" that "decisions depend on other factors." Competitors at Tiquisate with a potential of at least 9,000,000 stems would have eroded United's monopoly of its Central America supply. United feared that

* That would constitute an added supply of about 18% (to the annual supply of about 50,000,000 stems).

variety bananas planted by competitors in Central America would increase and that could have an "adverse effect" on United (II 697A). Thus judging United's conduct by the results, the evidence is overwhelming that a substantial purpose in United's abandonment of Tiquisate, in the way it did, was to foreclose competition and to maintain its Central American monopoly, contra the Court (I 360A-1A, 5 and 6).

The above statistics also confirm the fact that the abandonment of Tiquisate was tied directly to United's plan to attempt to monopolize or maintain its monopoly of, the United States market. United's share of the United States market was as high as 70% in 1950. Then, with the competition from Ecuador, it dropped to 57% in 1960 and by 1964 was down to 42%. As a result of United's five year plan, United's share of the market increased to 49% in 1965, 54% in 1966, 55% in 1967 and 54% in 1968.*

In Woods Exploration & Proc. Co. v. Aluminum Co. of America, 483 F2d 1286, at 1307 (C.A.5) the Court stated, re §2 of the Sherman Act, "It is enough that defendants' market position is such that they have substantial power to thwart competition."

In its opinion, it appears that the Court held plaintiff to the burden of proving a specific "intent" (I 222A) or "intention", by direct or circumstantial evidence (I 218A) by United to violate the antitrust laws. That erroneous holding

* See Appendix to this brief, p. G.

overlooked the Supreme Court's holding on that critical point in Griffith, supra, 105; it stated:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements. United States v. Patten, 226 U.S. 525, 543; United States v. Masonite Corp., 316 U.S. 265, 275. To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 148 F.2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act."

Griffith, supra, 106, further held: "even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act." Likewise, here, arguendo, accepting the District Court's finding that Sunderland "did not take any action with specific intent to monopolize" (I 363A, 12) nonetheless plaintiff met its burden of proof by demonstrating that "a necessary and direct result" of United's threat and abandonment of Tiquisate was the maintenance of its monopoly in Guatemala, in Central America, attempting to monopolize the United States market or in foreclosing competition.

Moreover, the Supreme Court's reference to Judge Learned Hand's classic comment that "no monopolist monopolizes unconscious of what he is doing" fully answers and rejects the

Court's conclusion of law No.12 (I 363A) and the Court's impression about the "sincerity of Mr. Sunderland and the other UF witnesses" that "[t]hey testified lucidly about the difficult problems they were facing in the 1959-1964 periods ..." and that "their testimony [is credited] as supporting the legitimate motive in abandoning the Tiquisate operation in favor of other operations in other countries and in Eastern Guatemala." (I 219A). Arguendo, there can be more than one motive on such a question, and the results in evidence as a matter of law support plaintiff's position that a significant purpose in United's abandonment of Tiquisate in the way it did was anticompetitive and monopolistic.

In United States v. Patten, 226 U.S. 525, 543, the Supreme Court stated:

> "as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result."

The results showed that United's conduct in the abandonment* of Tiqiusate foreclosed competitors in furtherance of United's maintenance of its monopoly and that United is thus properly responsible for intending those results and the Court erred as a matter of law, in accepting United's witnesses statement to "the contrary." Accord: Thomsen v. Cayser, 243 U.S. 66, 85.

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* United's cutback and restriction of its Tiquisate shipments in the statutory period, before termination was likewise unlawful for all the reasons stated above.

Any alleged business excuse for violating the antitrust laws should have been rejected as a matter of law, Fashion Guild, supra; U.S. v. Trenton Potteries, supra.

In U.S. v. Aluminum Co. of America, supra, this Court (L. Hand, J.) stated (427):

> "Having proved that 'Alcoa' had a monopoly of the domestic ingot market, the plaintiff had gone far enough; if it was an excuse, that 'Alcoa' had not abused its power, it lay upon 'Alcoa' to prove that it had not. But the whole issue is irrelevant anyway, for it is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit. The Act has wider purposes. Indeed, even though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately."

Thus contra the District Court, the "whole issue" of United's "excuse" that it "had not abused its power "is irrelevant anyway, for it is no excuse for'monopolizing'a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit." Our facts are a fortiori that here there is no "excuse" where the monopoly power has "been used extortionately" to extract from IRCA a price less than a fair price. Therefore, under Fashion Guild, supra, U.S. v. Trenton Potteries, supra, and U.S. v. Aluminum Co. of America, the Court erred as a matter of law in dismissing the complaint based on defendants' alleged "legitimate business motive" which is immaterial and irrelevant. But arguendo, if material and relevant, "if it was an excuse, that [United] had not abused its power, it lay upon [United] to prove that it had not." But here, the learned Court

instead of placing that burden on United, erroneously placed it on plaintiff* (I 219A). United not only failed to carry that burden but plaintiff proved the threat and the Court found for the plaintiff on that factual issue (I 325A, 177-178, I 217A). The District Court having assumed the monopoly, it should have then ruled in plaintiff's favor in establishing the "abuse" of monopoly power in making and carrying out the threat. It erred as a matter of law in not doing so. But, in any event, plaintiff also proved that United's closing of Tiquisate was not motivated by legitimate business motives,** that United, for prohibited antitrust motives, terminated negotiations with Chalk*** and that United did not make a good faith effort to sell Tiquisate as a going concern to others.**** The overwhelming documentary evidence shows that Sunderland did know that Tiquisate, potentially, was one of United's best divisions for growing a variety banana such as the Valery. In fact, on the single most important factor, landed cost at U.S. ports, the Court assumed plaintiff's figures were accurate and they showed that Tiquisate would be competitive with United's other divisions. The contemporaneous documentary evidence establishes that Sunderland knew this and had reason to doubt the 1961 Miller Report, which in any event was antiquated by 1963 and was based on many false assumptions, such as shipments in stem form instead of in boxes. Actual

* Since plaintiff proved the monopoly and the Court assumed it, "plaintiff had gone far enough," under <u>U.S.</u> v. <u>Aluminum Co. of America</u>, (<u>id</u>.).

** <u>Supra</u>, pp. 65-93.

*** <u>Supra</u>, pp. 20-37.

**** <u>Supra</u>, pp. 37-39.

Valery trials at Tiquisate gave yields that were "so excellent" that "decisions probably depend on other factors"; Valery plants incurred practically zero blowdowns at Tiquisate; yields from production of the Valery at Tiquisate was at least comparable to Honduras. The contemporaneous documentary evidence also establishes that Sunderland told Chalk in December 1963 that the Valery would produce "beautifully" in Tiquisate; it could produce 4,000,000 stems on 10,000 acres or 400 stems per acre; that Chalk could have just as big a division as he wanted at Tiquisate as "there's all the land in the world there." United, by letter, also advised Chalk that Tiquisate had one of the best locations because of its proximity to U.S. ports (and thus ocean freight advantage); that it could be built up to 9,000,000 stems for an additional investment of $9,000,000, which was a misrepresentation since other documentary proof showed it could be done for $2,377,000 (20,850 acres at $114 per acre); Chalk was advised that he would be buying United's investment of $1,000 per acre for approximately $100 per acre, or depending on acres purchased, a $20,000,000 to $30,000,000 investment for $2,000,000 to $3,000,000.

The documentary evidence clearly established that it was United that aborted the negotiations by not wanting to sell to Chalk, not because United didn't consider him serious, not because he did not have financial capability, but for United's own reasons, to wit, to maintain its monopoly and to foreclose competition.

Documentary evidence clearly established one of United's stated reasons, to wit, that United wanted to take

advantage of the time available to it up to 1966, in which to suggest creation of a competitor and submit a plan of compliance with the Consent Decree, and in that way United would gain time to accomplish its plan, in the period of transition, to get into full scale production with the Valery, have boxing and the Chiquita brand name. United finally created a competitor in 1972 when it sold Bananera to Del Monte. All of the Court's findings which raised doubts as to whether the Justice Department would have approved a sale to Chalk, support plaintiff's position, since a sale to Chalk <u>without</u> partial or complete credit for compliance under the Consent Decree would have meant double competition for United, to wit, a competitor from Western Guatemala shipping bananas via IRCA to Barrios to the United States market in 1964, and then post-1966, creation of another competitor to comply with the Consent Decree. Chalk could not purchase the land from others who had purchased from United, for without United, the investment of $1,000 per acre would be lost to Chalk or any other purchaser since it was United's policy to tear out the entire irrigation system, tear up its 90 miles of railroad tracks and to break up the other components of the division. Without United's willingness to sell facilities to Chalk, Chalk would have ended up with land and no facilities. The remaining findings by the Court on Chalk are generally irrelevant because of time or contrary to the hard documentary evidence.

The documentary evidence (II 767A) clearly establishes that in 1963 United did not try to sell Tiquisate to its competitor,

Ecuadorian Fruit, even though the opportunity was most appropriate, and that evidence is far superior evidence of United's lack of effort to sell Tiquisate than Sunderland's sworn ipse dixit 10 years later when he knew what was best for the defense. The Court's* reliance (I 344A, 229(a)) on a statement made by Mr. Staff of Ecuadorian about Tiquisate in <u>1960</u> is totally irrelevant since we know that the prospects for producing the Valery at Tiquisate in <u>1963</u> were "so excellent". The Court also accepted Sunderland's testimony regarding an alleged conversation with Mr. Consolo, another competitor, who allegedly expressed no interest in Tiquisate (I 344A, 229(c)), without any support in the contemporary documents. With reference to a proposed sale to West Indies, it had a "real problem" as to how it could "swing such a deal" for a million dollars (I 345A, 229(d) and United never produced the prospectus that was given to its representatives; in any event, that meeting was in May 1963 which was even before United had received the results of the 1963 study (May 10, 1963, II 387A). Moreover, after United decided in August-September of 1963 to recommend the piecemeal sale of the Tiquisate lands, there is no evidence that it tried to contact West Indies, Ecuadorian or Consolo in an attempt to interest them or anyone else in purchasing Tiquisate. Furthermore, United and CAG resolutions are completely silent on selling Tiquisate as a going concern despite the fact that United knew that its value as a going concern was <u>substantially over</u> the salvage value of $6,500,000 (I 350A, 235).

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* Contra the Court (I 225A), there is <u>no evidence</u> to support its statement that the 100,000 acres of land United ceded to the Government was banana land or that it was ever under cultivation as banana land. Defendants never made any such contention.

The Relevant Market. The relevant market is the area in which to measure whether there is monopolization. The District Court stated (I 215A): "Assuming, arguendo, that the relevant market for purposes of Section 2 of the Sherman Act is the importation of bananas into the United States solely from Guatemala" or as it stated at another part of the opinion (I 250A, ftn. 13) that it was assuming, arguendo, in favor of the plaintiff that "the relevant market under the Sherman Act is the 'service of transportation of bananas from the western side of Guatemala to Puerto Barrios on the Atlantic side for shipment to the United States'". A separate relevant market is the same service from the eastern side of Guatemala. The Court found (I 254A, 6) "United-CAG at all material times exported most of all of the bananas sent to the United States from Guatemala."

Plaintiff also contends that a separate relevant market is the import of bananas into the United States from all countries, except Ecuador, which we call Central America. Ecuador is a relevant market to itself. The United States is also a separate relevant market.

Pertinent cases are: Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., 438 F2d 1286 (C.A.5); Denver Petroleum Corp. v. Shell Oil, 306 F. Supp. 289 (D. Colo.); Case-Swayne Co. v. Sunkist Growers, Inc., 369 F2d 449 (C.A.9); Mandeville Farms, supra, 222, 240. In Woods, supra, the Court held that a single oil producing area, the Appling field, constituted the relevant market and stated in that connection as follows (at 1304):

> "Defendants argue that the Appling Field cannot constitute a relevant market for it is a source of supply rather than a market. This argument, however, fails to recognize that 'relevant market' is simply a shorthand phrase used to describe 'the area within which the strengths of competitive forces is measured.' P. Areeda, Antitrust Analysis ¶201, at 71 (1967). It does not necessarily mean the selling place."

The Court, in holding that the monopoly power was over the extraction of gas from one local field, observed that plaintiffs there did

> "not argue that defendants possess or have attempted to possess monopoly power over the marketing of natural gas. They instead contend that defendants possess monopoly power over the extraction of gas from the Appling Field." (1305)

And that:

> "It is the 'part' of 'trade or commerce' with regard to which we must measure the power to exclude competitors.' (1305)

Woods, supra, affirmatively approved and followed Denver; see 438 F2d, at 1305, in defining a local gas producing area as a relevant geographic market. The Court stated inter alia:

> "Nor does it matter that this circumscribed area of competition is small or that the effect on the public at the place of ultimate sale may be minor." (1306)

> "more important, we do not think that absolute success in excluding competition is an essential element to proving monopoly power under section 2. It is enough that defendants' market position is such that they have substantial power to thwart competition." (1307)

> "they could block transportation from competing wells" [in the local area]. (1307)

The Court found (I 255A, 7) that bananas in volume, could not, as a practical matter be transported from western Guatemala to the United States except via IRCA. It also found (I 253A, 3) "to market CAG bananas required at all times that they be shipped over IRCA to Barrios."

Regarding Section 2, relative transportation advantage is the key to marking Guatemala-West as a separate area for the purposes of measuring competitive forces. United's control over IRCA or contracts with IRCA gave it rate and equipment preferences which served as impediments to entry of new competition, and insulation for United's position. That makes western Guatemala a relevant market.*

The Court in Case-Swayne, supra, at 455-6 stated: "the area [of effective competition] may be limited by differences in costs of ... transportation." ** In addition to western Guatemala, that statement also applies to Central America with it water transportation advantage over Ecuador, by as much as 150%.***

Clearly, monopoly power may be inferred from market share, Denver Petroleum, supra, at 304; here United shipped

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* By means of its control over IRCA, and the preferential rate and equipment contracts obtained through that control, United built up an illegal monopoly in western Guatemala bananas. The Standard shipments, which could exist only through United forbearance by not preempting equipment and which had continued only under discriminatory rates and services, ceased completely in November 1961. Thereafter, CAG was the only shipper of export bananas from western Guatemala.

** That relative transportation advantage, as an isolating factor, will define a relevant geographic market is settled law. In addition to Denver and Woods, supra, see e.g. Amer. Crystal Sugar Co. v. Cuban-Sugar Co., 259 F2d 524, 529 (C.A.2); Erie Sand and Gravel Co. v. F.T.C., 291 F2d 279, 281 (C.A.3); and U.S. v. Kimberly-Clark Corp., 264 F.Supp. 439, 457 (N.D. Calif.).

*** Supra, pp. 53-4.

between 70% and 82% of all bananas exported to the United States market from Central America in the period 1954 through 1964. United's share of that same market was 76% in 1965 - 1966, 75% in 1967 and 68% in 1968. That was monopoly power. As held by this Court in Kreager v. G.E. Co.,497 F2d 468, 471 (C.A.2), it is sufficient to show, as to a relevant market, "monopoly power ... coupled with a 'dangerous probability' of success." The latter was also present. We submit the proof clearly shows United's monopolization of the Central America source of supply and therefore a violation of §2.

United was the dominating shipper from all sources together including Ecuador. Considering United's monopoly in Guatemala, Central America, the western division of the United States; its exclusionary intent and power; United's control of, and contracts with, IRCA; the anticompetitive aspect of the Tiquisate shutdown; the fact that United caused shipments by independents from Ecuador to the United States to drop by 10,000,000 stems on an annual basis from 1964 to 1968 and kept it there for the next four years (III 1256A); Central America's (which United monopolized) share of the United States market was 63% in 1965, 70% in 1966, 73% in 1967 and 80% in 1968, and United's share of the United States market was 70% in 1950, 63% in 1955, 57% in 1960-1961, 55% in 1962, 48% in 1963, 42% in 1964,49 % in 1965, 54% in 1966, 55% in 1967, 54% in 1968, then United also monopolized the United States geographic market. "It is enough that defendants' market position is such that they have substantial power to thwart competition." Woods, supra, 1307. That holding pertained to §2 of the Sherman Act.

Plaintiff contends that the conduct complained of

in this Point I is also in violation of §1 of the Sherman Act, §73 of the Wilson Tariff Act* and §7 of the Clayton Act; §1 of the Sherman and §7 of the Clayton will be discussed in the next section.

Point II

UNITED SUPPRESSED COMPETITION BY ITS MASSIVE ANTITRUST VIOLATIONS, NAMELY, PER SE RESTRAINTS OF TRADE; MONOPOLIZATION; AND ACQUISITION AND USE OF IRCA STOCK WHERE THE EFFECT "MAY BE" TO UNDULY RESTRAIN COMPETITION OR "TEND" TO CREATE A MONOPOLY; SAID VIOLATIONS CONTINUED DURING THE RECOVERY PERIOD.

§1 of the Sherman Act (15 USCA §1) prohibits "Every contract, combination ... or conspiracy in restraint of trade or commerce ... with foreign nations." Plaintiff contends that United was a party to concerted restraints of our foreign commerce, illegal under this section, with respect to the transportation of bananas over IRCA from Guatemala through Puerto Barrios to the United States.

A violation of §1 requires three elements: (1) a contract, combination or conspiracy, (2) involving a proscribed restraint, (3) which affects commerce**; in this case, our foreign commerce.

1. The contract, combination or conspiracy. IRCA was a common carrier of bananas and other commodities, United

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* §73 of the Wilson Tariff Act (15 U.S.C.A. §8) was intended to make certain that the prohibitions of §§1 and 2 of the Sherman Act would apply with respect to our imports. No separate discussion of that section now appears to be indicated.

** *Supra*, p. 116, footnote, and *Gulf Oil Corp.*, *supra*, p.116, footnote.

a grower, purchaser and shipper, and CAG, its wholly-owned subsidiary corporation, also a grower, purchaser, and shipper.

(a) The contracts between IRCA and United-CAG were blatant trade restraints and are clearly within §1 of the Act; those contracts commenced in the pre-statutory period and continued in effect during the statutory period.

(b) Likewise, the combination and conspiracy comprised of United's control over IRCA exercised in part through ownership by CAG of a block of IRCA stock is clearly within §1. As the Supreme Court held, in U.S. v. Amer. Tobacco Co., 221 U.S. 106, 181, 182, the Sherman Act prohibits all "methods devised in order to monopolize the trade by driving competition out of business" and one of the methods there was "the control exerted by the taking of stock in one or another or in several" corporations for "the purpose to restrain others and to monopolize."

(c) Moreover, we submit that the combination and conspiracy between United and CAG is also covered even though CAG was a corporation wholly owned by United.* The Supreme Court held as follows in Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134, 141-2:

> "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership

* The District Court "assumed, but only arguendo, in favor of the plaintiff that "Uf and CAG come within the intercorporate conspiracy doctrine" (I 250A, ftn. 13 original emphasis).

> "could not save them from any of the obligations that the law imposed on separate entities. See Timken Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947)."

Accord: Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 703; U.S. v. Genl. Motors Corp., 121 F2d 376, 404 (C.A.7); Sanib Corp. v. United Fruit Co., 135 F.Supp. 764 (S.D.N.Y.).

2. The proscribed restraints. The contracts with IRCA obtained through United's exercise of control over it and United's other exercise of control over IRCA's operations had as their purpose and effect requiring IRCA to withhold its facilities - essential for importing bananas into the United States from Guatemala - from independents by means of discriminating against them in rates and services as well as charging United-CAG unfairly low rates.

Those were clearly proscribed restraints on the trade of IRCA with United-CAG and with independents. Since the specific intent was to accomplish such restraints, they are illegal per se. U.S. v. Columbia Steel, 334 U.S. 495, 527; U.S. v. Timken Roller Bearing Co., 83 F.Supp. 284, 308 (N.D. Oh.), aff'd as to liability 341 U.S. 593. In Northern Pac. R.R.Co. v. United States, 356 U.S. 1, 5 (1958), the Supreme Court stated

> "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"

The contracts and control were of the essence of undue

restraint and monopolization; viz., the coercion of IRCA and the purposeful exclusion of competitors. U.S. v. du Pont & Co., 351 U.S. 377, 393; U.S. v. United Shoe Machinery Corp., 347 U.S. 521, aff'g per cur. 110 F.Supp. 295, 342-3 (D. Mass.); U.S. v. Columbia Steel, 334 U.S. 495; Amer. Tobacco Co. v. U.S., 328 U.S. 781, 811-815; U.S. v. Yellow Cab Co., 332 U.S. 218; Apex Hosiery Co. v. Leader, 310 U.S. 469, 497; U.S. v. Aluminum Co. of Amer., 148 F.2d 416, 427 (C.A.2); Arnold, Schwinn v. U.S., 388 U.S. 365.

By reason of the contracts and control, IRCA in substance became a captive of United-CAG, like the franchisees and other captive dealers whose trade was unlawfully restrained; as in Yellow Cab, supra, (preventing cab operating companies under their control from purchasing cabs from manufacturers other than their manufacturing company); see, also, Simpson v. Union Oil Co., 377 U.S. 13, 16, 21 (a consignment agreement with a retailer to control his resale price injures commerce by depriving him of the exercise of free judgment whether to be a consignee and/or to sell at competitive prices); Albrecht v. Herald Co., 390 U.S. 145; Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134; U.S. v. Parke, Davis & Co., 362 U.S. 29; U.S. v. Schroder's Son, Inc., 252 U.S. 85, 99 (resale price agreement illegal per se - its vice is "the effort" "to destroy the dealers' independent discretion"); Ansul Co. v. Uniroyal, Inc., 448 F2d 872 (C.A.2); T.W.A. v. Hughes, 449 F2d 51 (C.A.2) rev'd on other grounds 409 U.S. 363; Hoopes v. Union Oil Co., 374 F2d 480 (C.A.9); Bales v. Kans. City Star, 336 F2d 439 (C.A.8) (requirement that

plaintiff not sell other newspapers without defendant's permission).

These were contracts "made with intent to set up a "monopoly over the import into the United States of bananas from Guatemala and over their IRCA transport; hence their illegality per se. U.S. v. Aluminum Co. of America, supra, 428.

The learned District Court overlooked the critical fact that the contracts, in existence in the statutory recovery period, required IRCA to prefer United (CAG) on all the equipment it leased from CAG (II 670A). Moreover, the Court completely failed to draw the appropriate legal conclusions from its own finding of fact that there "is no doubt that CAG was given preferential treatment over Standard in the transportation of bananas from the West Coast" (I 212A).

Without doubt, the preference in United (CAG) on the equipment, by contract and in practice, continuing into the recovery period, was a per se restraint. In addition, the discriminatory wharfage charge on bananas and the discriminatory practices at the Barrios wharf, also continuing into the recovery period, were per se restraints.

The law is well established that in cases of per se restraints, plaintiff does not have to prove public injury, Klors, supra, at 211-212; Radovich v. National Football League, 352 U.S. 445, 453; Radiant Burners, Inc. v. People Gas, Light & Coke Co., 364 U.S. 656. Apparently, the only proof that would have satisfied the Court was if Standard produced as much as it wanted and then when it called for cars from IRCA and IRCA did not deliver, Standard was left with rotten bananas. Thus, in failing to recognize the wrong of foreclosure of competition, the learned Court missed the thrust of plaintiff's case involving Standard. Standard was operating

in Guatemala at United's sufferance. Therefore it limited its production accordingly to make certain that it did not overproduce and end up with rotten bananas. Plaintiff's case is based on what Standard did not produce because of the per se violation and therefore did not ship. That is a case of foreclosure. Plaintiff's position is that Standard limited its capacity to produce, and hence to ship over IRCA, to what it understood the railroad could carry for it with available equipment after giving preference to CAG-United.

Standard knew the terms of its ability to ship over IRCA, and if it tried to ship too many stems, United was in the position to increase its plantings and preempt the IRCA equipment, thus causing huge losses to Standard.

The evidence shows that Standard imported into the United States*, on the average, from all sources, over 9 million stems annually, for the period 1959 through 1964.** In the same period it imported large quantities from Ecuador.

Contra the Court (I 287A, 98), the statistics show that Standard did expand its operations in other Central American countries while it was operating in Guatemala. Standard increased its production in the other central American countries from 4,752,000 stems in 1959 to 6,795,000 stems in 1961 or by more than 2,000,000 stems, and to 8,024,000 in 1962*** or over 3,200,000 more stems than in 1959.

* Since United's share of the Canadian market was slightly higher than its share of the United States market, it is fair to assume that Standard, like United, ships no more than 11% of its bananas to Canada (TR 1802-4).

** For Standard's total imports into the United States and Canada from each source of supply, see Appendix to this brief, p.K.

*** Even though Standard terminated its operations in Guatemala in November 1961, since it was necessary to plant in 1961 to get production in 1962, then it is fair to look to the 1962 results to determine expanded plantings, under the Court's test, while Standard was in Guatemala.

Furthermore, it should be noted that production in Costa Rica - East was only at 237,000 stems in 1959, the year that United refused to return 100 banana cars to IRCA. It increased in Costa Rica - East by 500,000 stems in 1960 and in 1961 shipments increased by 1,246,000 stems over 1959; by 1964 shipments increased by 2,400,000 stems over 1959.*

Standard shipped to the United States and Canada from Honduras for the period 1959 through 1964 an average of about 5,000,000 stems per year.** United's tropical cost at Tiquisate in 1960 and 1961 (after $130 rate) was lower than United's comparable cost in Honduras (II 821A); it is fair to assume that Standard's costs were comparable (see U.S. v. Aluminum Co. of America, supra, p.416); therefore, since the ocean freight was the same (II 905A), then the reason for Standard's greater shipments from Honduras than from Guatemala must have been due to the fact that United's anti-competitive practices in Guatemala restricted Standard's capacity to ship and thus its capacity to produce. But for United, Standard would not have abandoned western Guatemala after the 1961 storm, especially since it was even further advanced than United in Valery production (TR 995-6). In 1961, Standard had no incentive to invest in Guatemala when it knew that its own shipments would be subject to CAG-United preclusion if United was so minded. Furthermore, United still had its large block of IRCA stock and had until

* The Northern Railway Company in Costa Rica encouraged Standard to expand there (PX 1160, pp. 7-8).

** See appendix to this brief, p.K.

1966 to dispose of it. To effectively compete with United in Guatemala, Standard, like United, needed higher production in order to spread its fixed costs and thus lower its unit costs. But Standard's operation was always in an economic straightjacket, always subject to the risk that United might cripple its shipments by preempting the equipment at the critical times. Under such circumstances, Guatemala was not attractive for a large investment, the success of which, was in the hands of United, Standard's dominant competitor. We submit that if Standard had not suffered the huge economic disadvantages it had incurred as a result of the preferences in United, and IRCA had acted as a common carrier that accepted shipments without any rate or service preferences, the compelling conclusion is that Standard would have built up its operation in Western Guatemala to a point substantially higher than in fact occurred.*

Guatemala West, as a source of imports into the United States and Canada competitive to United**, in relation to all countries other than Ecuador, in the period 1959 through 1963, ranged from a low of practically zero in 1962 and 1963 to a high of 20% in 1960; but for United's antitrust violations Guatemala West's share would have been substantially higher (II 727A).

The increase in the flow of bananas from Ecuador to the

* Contra the Court (I 291A, 116), reserves on United's books for past inadequate payments to IRCA did not ex post facto cure the past line haul rate discriminations against Standard. Furthermore, United even under <u>Ripley</u> received a discount of over $5.5 million; besides there were other discriminations and preferences in United that <u>Ripley</u> did nothing about.

** Haase testified that from 1945 on, there were 40 or 50 persons who wanted to ship and half who actually did ship; they apparently were unable to survive United's imposed discriminatory rate and service structure (TR 77-8).

United States, to wit, from 13.4 million stems in 1954 to 25.4 million stems in 1960 (III1256A) demonstrates the ability of independents to enter the market and expand their shipments when the source of supply and transportation to port of export were not controlled by United, even though such independents were at a tremendous cost disadvantage due to the higher cost of ocean freight from Ecuador to the U.S. gulf ports as contrasted with Guatemala (a $20 per ton disadvantage) plus extra steaming time to market, delays and tolls at the Panama Canal. But for United's control over IRCA and the discriminatory rate and service structure on IRCA, an independent banana industry would have developed in Guatemala; as a result of United's preclusive practice and monopoly in Guatemala, independents were foreclosed. As Sunderland said to Chalk, there's all the land in the world there at Tiquisate. Fox testified "Ease of entry was very, very simple" (TR 1669-70) - to enter the market for the importation and sale of bananas into the United States. It took very little assets, a buying office in Ecuador, arranging ocean shipments in available spaces and, at the marketing end an office with a telephone or two (TR 1669-70). Fox's testimony pertained to Ecuador. It should have been even simpler to enter the banana business in Guatemala than Ecuador* with its far shorter water haul; it would have been, but for United's hold over IRCA, its monopolistic and anti-competitive practices in Guatemala through the IRCA bottle-neck.

* There were numerous importers of bananas into the United States who purchased bananas in Ecuador (II 825A-847A), namely, Standard Fruit, Atlantic Banana, Banana Supply, Continental Fruit Co., Southern Banana, Ecuador Fruit Imp. Co., Effo Banana & Sales, Parker & Co., and West Indies Fruit.

Since the landed cost for the Valery banana, boxed, from western Guatemala would be competitive with United's other divisions, as shown by plaintiff* and assumed by the Court tc be accurate (I 222A), and also would have had a clear cut competitive advantage over Ecuador,* then it is fair to assume that Standard could have done the same, and barring preferences in favor of United, it would have been better for Standard to ship from western Guatemala than from Ecuador.

The statistics provide powerful objective evidence that there had, in fact, been a conspiracy** between United and Standard to exclude potential competitors from Central America. United and Standard together had the following share of the Central American (excluding Ecuador) market on stems imported into United States ports for the United States and Canadian market (see Appendix to this brief, p.E): 1959 - 90%; 1960, 1961- 95%; 1962 - 97%; 1963 - 95%. In the major Central American countries exporting to the United States: Guatemala, Honduras and Costa Rica, United and Standard together had close to 100% of the shipments*** (II 727A); United itself had close to 100% of the shipments from the other major Central American exporting country, Panama.

Section 7 of the Clayton Act as originally enacted in 1914 covered only stock acquisitions and as amended, in 1950, covered both stock and asset acquisitions. The intended meaning before and after amendment is to prohibit an acquisition if its effect "may"

* See appendix to this brief, p. M.

** An erroneously excluded (TR 135-6) document (III 1392A, PX 145 for ident. dated 4/1/47, an internal IRCA memo to IRCA's president) shows that Standard cleared its entrance into Guatemala with Mr. Samuel Zemurray, United's president; Standard needed more fruit and a "large quantity of independent fruit is available" in western Guatemala.

*** Except for 1959 in Costa Rica.

either (a) be to lessen competition, or (b) tend to create a monopoly - in any commodity or service with a substantial impact on the interstate or foreign commerce of the United States. That "section of the country" does not mean any particular section of the country, see U.S. v. Pabst Brewing Co., 384 U.S. 546.

Section 7 of the Clayton Act applies to acquisitions of the company "engaged in commerce." * "Commerce", of course, means the interstate or foreign commerce of the United States (§1, Clayton Act).

Unlike the Sherman and Wilson Tariff Acts, §7 of the Clayton Act makes the stock acquisition and use illegal where the effect "may be" to unduly restrain competition or to "tend" to create a monopoly. As the Supreme Court held: "Section 7 of the Clayton Act is concerned 'with probabilities, not certainties'". F.T.C. v. Consolidated Foods Corp., 380 U.S. 592, 594-5, and cases cited there. The circumstances of and surrounding the acquisitions may "establish probability in limine", or "post-acquisition conduct may amount to a violation of §7." Consolidated Foods Corp., supra (at 598), and cases cited there. Here, the probability is established of both undue restraint and monopolization; it is established both at the beginning and by post-acquisition conduct.

* The District Court assumed, arguendo, in favor of the plaintiff "that IRCA, the acquired company, was 'engaged in commerce' under Section 7 of the Clayton Act" (I 250A, ftn. 13) and cited the recent Supreme Court case of Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 195 (Dec. 17, 1974), which reaffirmed the concept that "transport" is an activity "within the flow of interstate commerce" for purposes of §7. Therefore, "transport" by IRCA of bananas destined for the United States is in the foreign commerce of the United States, hence IRCA is engaged "in commerce" for purposes of §7.

The Court implicitly assumed the §7 violation but erred as a matter of law in creating a new requirement for recovery of money damages under Section 7 as follows (I 230A):

> "... the threat of competition is measured at the time of suit. *United States* v. *E. I. DuPont de Nemours & Co.*, *supra*, 353 U.S. at 607. " (original emphasis)

Thus the District Court vitiated the normal four year statute of limitations of Section 4 of the Clayton Act. United's holding of IRCA stock continued into the recovery period, namely until January 1962, but that does not help plaintiff, according to the Court. It stated (I 229A):

> "The difficulty here is that Section 7 speaks principally to the future. It was intended largely to nip in the bud incipient dangers of lessening competition, restraint of commerce or a tendency to monopoly."

In *United States* v. *du Pont de Nemours & Co.*, 353 U.S. 586, the United States in 1949 was hardly nipping "in the bud" du Pont's 1917-19 acquisition of General Motors. The Supreme Court in *du Pont* stated (607): "the test of a violation of §7 is whether at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned results." Since the United States was seeking divestiture, if du Pont did not hold General Motors' stock at the time of suit, the litigation would have been moot. But in private damage suits the remedy is different, namely, damages for past wrongs. Moreover, *Gottesman* v. *General Motors Corp.*, 414 F2d 956, 960-1 (C.A.2) never conditioned money damages upon the violation being in existence at the time suit commences, as the Court erroneously did.

Point III

THE UNDUE RESTRAINT AND MONOPOLIZATION "FORBIDDEN" IN THE SHERMAN AND WILSON TARIFF ACTS, AND THE IRCA STOCK ACQUISITIONS AND USES, "FORBIDDEN" IN SECTION 7 OF THE CLAYTON ACT, "INJURED" IRCA IN ITS "BUSINESS OR PROPERTY", WITHIN §4 OF THE CLAYTON ACT.

A. Compensable Injury to IRCA

Section 4 of the Clayton Act (15 USCA §15) provides that any person injured in his business or property by reason of any violation of §§1 or 2 of the Sherman Act or §7 of the Clayton Act is entitled to triple damages.

Plaintiff proves his case where he "proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss", Continental Co. v. Union Carbide, 370 U.S. 690, 697, 704 or proves damage plus "wrongful acts [which have a] tendency to injure plaintiffs' business", Bigelow v. R.K.O, Pictures, Inc., 327 U.S. 251, 264-5.

Moreover, plaintiff need only prove "some damage" of which the violation is "a material cause." In the first Zenith case in the Supreme Court (Zenith I), Zenith Corp. v. Hazeltine, 395 U.S. 100, 114 n.9, the Court held that a plaintiff's

> "burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond the minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under §4."

The Court glossed over the clear injury inflicted on IRCA by the wrongful United-CAG restriction, then termination, of the CAG shipments after February 1961, which commences the recovery period; the Court misapplied the appropriate Supreme Court tests with respect to IRCA's losses in the recovery period from foreclosure of independent traffic by the defendants' violations. Those legal tests correctly applied to the facts of record warrant a finding that IRCA's losses are compensable.

B. Injury From Wrongful Restriction And Termination of The CAG Traffic

1. Injury From United's Antitrust Violations During the Recovery Period. In Zenith I, the Supreme Court held (at 120) as follows:

> "Zenith thus continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws. This deprivation in itself necessarily had an impact on Zenith and constituted an injury to its business."

Likewise, United's violations, involving as they did restriction and termination of the CAG traffic, "necessarily" had an adverse impact on IRCA and constituted an injury to its business and property.

Plaintiff proved a loss here from the restriction and termination of the CAG traffic. The year 1960 was the last pre-recovery year and it compared with subsequent years as follows:

Year	CAG Banana Carloads (II 807A)	IRCA Dollar Revenue Therefrom (II 807A)
1960	17,559	$2,283,000*
1961	13,693	1,780,000
1962	7,305	950,000
1963	9,177	1,193,000
1964 (7 mos.)	6,790	883,000**
1965 - 1968	-0-	-0-

* After adjusting for the Ripley increases paid in 1961 (II 802A-1).

** Adjusted through July 31, 1964 at $130 per car.

Plaintiff's exhibit 152 (II 465A) stated: "If no bananas had been moved during 1960, net loss would have been approximately $2,064,245* instead of $667,359." Thus there was a benefit (II 474A) of $1,397,000 from all banana traffic in 1960, including west and east coast shipments. By deducting the revenue of $171,000** for the east coast shipments (PX 1396), the result is a profit to IRCA of approximately $1,200,000 from west coast banana shipments in 1960.

Since 72% of the west coast shipments in 1960 were CAG's (II 806A-7A), 72% of $1,200,000 was the benefit to IRCA accruing from the CAG traffic in 1960, or approximately $864,000 on 17,559 cars. Using $864,000 on 17,559 cars as the basis for the profit to IRCA, and applying that to the actual CAG cars shipped during the damage period, 1961-1968, results in IRCA injury of, at least, $5,089,000*** from CAG non-shipments due to the restriction and elimination of its shipments. In addition, IRCA was injured because CAG had not reached its maximum potential by February 16, 1961 due to defendants' antitrust violations in the pre-recovery period.

The railway operating statistics confirm the conclusion that the loss of the CAG banana traffic inflicted substantial injury on IRCA. The net loss for the period 1961 to 1968 from railway operations for the Guatemala Division was $14,682,000 (II 418A),

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* In addition, IRCA lost the revenues and profits from the transportation of imports and wharfage thereon during the recovery period - part and parcel of abandonment of the Tiquisate operation for unlawful reasons.

** After adjusting for the <u>Ripley</u> increases.

*** Compensable injury includes lost profits to the date of a liquidation plus the then going concern value absent the violation, <u>Albrecht</u> v. <u>Herald</u>, 452 F2d 124 (C.A.8); permanent damage to IRCA is discussed in the text, <u>infra</u>.

from which we have subtracted $1,256,000 (representing the loss of $157,000* in the year 1960 and assuming that that loss continued for eight years) which results in a net loss from railway operations in Guatemala attributable to United's antitrust violations of at least $13,426,000. Revenue on all bananas from Guatemala west constituted about 27% of total freight revenue of IRCA's Guatemala division in 1960** (before adjusting for the Ripley decreed rates) and ton-miles for that banana traffic was in excess of 40% (PX 1523, p.3); these statistics show the importance of the west coast banana traffic to the Guatemala division.

In addition to the above, there was other evidence of injury in the recovery period squarely attributable to the loss of the CAG banana traffic. E.G. there is the evidence of permanent injury in 1964 when the CAG traffic was completely ended and the subsequent loss of the properties of IRCA's Guatemalan division due to a judicial foreclosure*** of the mortgage in 1969. The value of the Guatemala Division goes to the measure of damages, not the fact of damage. But for defendants' antitrust violations, CAG would have continued to ship over IRCA at least at the rate of 17,559 cars per year and IRCA would have had, at least, an additional

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* This represents the loss from railway operations of $1,030,000 (II 418A) which has been adjusted by the expected income of $873,000 for the difference between the rates paid in 1960 and the Ripley judgment (II 802A-1) in order to place the operating results of the Guatemala Division for the year 1960 on a basis comparable to operating results during the recovery period when the Ripley rates were being paid.

** Revenue to IRCA from bananas shipped by United from Bananera in 1960 was only $128,025 (PX 1396, p.3) out of a total banana revenue in that year of about $2,500,000 (III 925A).

*** Since the takeover was in a proprietary, not sovereign capacity, the defense of sovereign acts does not apply. In any event, the defense does not apply in so far as the take-over is considered as evidence of the antecedent permanent injury.

$5,000,000 in profits which would have made it unnecessary to borrow $4,000,000 from the Government of Guatemala in 1968* and, of course, there never would have been a mortgage or a foreclosure, contra the Court** (I 239A). CAG and United in 1960 recognized "the fact that future banana shipments from Compania Agricola, the single greatest source of revenue for [Haase's] railroad, is vital to the survival of I.R.C.A." (II 379A). Therefore, United foresaw the fatal consequences to IRCA due to its antitrust violations.

The loss of IRCA's properties under the judicial foreclosure in 1969 is powerful evidence of the permanent damage to IRCA in 1964 or as a direct injury to IRCA resulting from United's antitrust violations.

Moreover, but for CAG's restriction and termination of its shipments resulting from defendants' violations of the antitrust laws, IRCA would not have incurred severance payments to its Guatemalan employees in the period after February 16, 1961 of approximately $1,950,000*** and would not have had a capacity in personnel and physical plant and equipment far beyond its needs (TR 183-7).

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* PX 237 - PX 241, PX 245, PX 247, PX 249, PX 250, PX 261, PX 264, PX 265 - PX 270, PX 272, PX 273, PX 275, PX 277, PX 281, PX 282, PX 284, PX 287, PX 291 - PX 293, PX 298, PX 300, PX 302, PX 306, PX 322 and PX 328.

** The Court overlooked the fact that as of December 31, 1968 creditors of IRCA were owed close to $10,000,000 (PX 1389, p.3) and the preferred stock had a par value of $10,000,000 plus accrued dividends of $10,000,000 (PX 1389, p.4); thus there was a priority of over $30,000,000 before the 68% common stock interest (I 240A).

*** PX 1308, PX 1309, PX 1311, DX 231, p.3, III 1118A.)

Most of the declines in revenue from sources other than bananas for the Guatemala Division had occurred by the end of the year 1960, antedating the recovery period (III 925A). In fact the events outlined by the Court in the 1950's, namely a competing highway and port (I 238A-9A) merely meant that in and after 1961, IRCA was in a more exposed position than ever and CAG's restriction and elimination of its own shipments caused catastrophic losses to IRCA.

The above stated injury to IRCA was caused by United's violations of §§1 and 2 of the Sherman Act and §7 of the Clayton Act.

2. Injury From United's Antitrust Violations During The Pre-Recovery Period Under Zenith II. Moreover, with respect to the injury flowing from the restriction and cessation of CAG shipments, United-CAG's pre-1961 conduct may also be considered, under Zenith II (402 U.S. 321). Our primary position is that the unlawful conduct after February 1961 was one factor materially contributing to the injury here complained of viz. the CAG shipment restriction and termination; hence under Zenith I, supra, Zenith II is not necessary to plaintiff's claim for such injury.

Zenith* II holds (339) that where specified recovery period damages flow only from pre-recovery period violations, and such damages, as future damages, were not recoverable in the pre-recovery period because "The fact of their accrual is speculative or their amount and nature unprovable" then, the cause of action

* In addition to not following Zenith, the Court overlooked (I 232A) Ansul Co. v. Uniroyal, 448 F2d 874, 884 (C.A.2)

as to such damages accrues for statute of limitations purposes when such damages actually occur and not when the conduct in violation of the law occurs.

The pre-1961 antitrust violations* were a material contributing factor to the reduction** and cessation of CAG shipments during the recovery period whether viewed by themselves or in combination with United-CAG's post February 1961 conduct. Applying Zenith I (118-9) to our case, the "cumulative effects" of United's antitrust violations during the pre-recovery period had "consequences lasting well into the damage period"; defendants' violations of the antitrust laws "had effectively prevented" IRCA from reaching "its maximum potential" by February 16, 1961 for carrying bananas from western Guatemala and IRCA therefore "suffered damage during the damage period from having a smaller share of the market than it would have had if the [violations] had never existed." Yet, before the reductions and cessation transpired, their nature, extent, and amount were speculative.

C. Injury From Wrongful Foreclosure Of Independent Traffic

1. Injury From United's Antitrust Violations During the Recovery Period. The authorities supra, Zenith, etc., also support plaintiff's contention that it suffered compensable injury from United's unlawful foreclosure of independent banana

* Supra, pp. 93-106.

** The reduction was ordered in the pre-recovery period (I 325A, 179, II 374A-5A, PX 520, II 570A).

traffic over IRCA. Likewise here IRCA continued to operate in the recovery period burdened by antitrust violations fastened upon it by the defendants in the pre-recovery period, some of which continued into the recovery period, i.e. preferences on banana cars to CAG and United; discriminatory rate structure on the line haul* and on the pier and the requirement that IRCA carry all bananas tendered by CAG, etc.; and United's unlawful monopolization. These _per se_ violations by defendants "_in [themselves] necessarily had an impact on [IRCA] and constituted an injury to its business,_" _Zenith_ I, _supra_, at 120; _inter alia_, the violations clearly restricted the capability of Standard and other independents in shipping bananas from western Guatemala over IRCA via Barrios to the United States.

Since Standard's shipments were at the mercy of United's first use of the banana cars and locomotives, Standard as a matter of economic reality necessarily limited its production of bananas to a level which it knew it could ship given its inferior position in availability of equipment; to do otherwise would be economic suicide. In _Bigelow_, _supra_, 260, the Supreme Court stated:

> "... other things being equal, the establishment of the discriminatory release system was damaging to the petitioners, who were relegated by it to a playing position inferior to that of their competitors."

In _Zenith_ I, it was defendants' "clear purpose ... to exclude concerns like Zenith ..." even though Zenith was in fact in the market. Here it was United's clear purpose to use IRCA as

* Line haul rate discrimination on bananas and imports was limited to the pre-recovery period through December 31, 1960.

its tool to restrict Standard and to exclude other companies. The Supreme Court in Zenith I stated (123-4):

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants wrongful acts had caused damages to the plaintiffs.'"

Our case re Standard's non-shipments over IRCA is one of "partial ... exclusion" and independants' non-shipments over IRCA, one of "total exclusion from a market."

The evil in Zenith I was that the conduct of defendants through their antitrust violations effectively prevented Zenith from exporting its television sets and radios from the United States to Canada except to the extent of about 3% of the Canadian market. Zenith's percentage share of the United States television market was approximately 16%. The Supreme Court accepted as adequate proof of damage the assumption that "Zenith - absent the conspiracy, would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share." (id. 116) Thus Zenith's share of the United States market was accepted as the standard for proving its damages in Canada.

The proof in our case is that bananas from western Guatemala in the year 1960 had approximately 10% of the United

States market (II 727A, PX 1536, II 846A); that percentage* dropped during the recovery period to: 6.82% in 1961, 3/4 of 1% in 1962, 1/4 of 1% in 1963, 0% in 1964 and thereafter.

As noted above, the evidence establishes that if IRCA had not had the movement of 24,500 cars of bananas from western Guatemala in 1960 it would have been worse off by at least $1,200,000 (II 465A, 474A). Since 38% of the $1,200,000 was the benefit to IRCA accruing from the Standard traffic in 1960, or approximately $336,000 on 6,896 cars. Using $336,000 on 6,896 cars as the basis for the benefit to IRCA, and applying that to the actual Standard cars shipped during 1961, the only year during the damage period in which Standard shipped, results in, at least, injury of $2,473,000 to IRCA from Standard non-shipments for the period 1961 through 1968.

As in Bigelow, supra, 262-3, foreclosure of the independent traffic caused injury to IRCA's "capacity to make profits" and its right "to continue their business." As a result of defendants' antitrust violations IRCA was prevented from reaching its maximum potential which would have been substantially higher than the rate of shipments in 1960, to wit, 24,455 cars; the extent goes to the amount of damages rather than the fact of damage.

The Court's requirement (I 236A) that plaintiff prove that the antitrust violations "actually kept potential shippers out of Guatemala" is merely another way of making plaintiff prove a public injury where there is a per se restraint, contra Northern Pacific, supra, Radovich, supra, Klor's, supra, etc. Moreover, the

* PX 1509 (II 846A) adjusted by 10% to eliminate Canada.

Court's holding is plainly contra Zenith I, supra, Continental Co., supra, and Bigelow, supra, on the proof required under §4 of the Clayton Act.

As in Zenith I "This deprivation in itself [preferences in United] necessarily had an impact on [IRCA] and constituted an injury to its business." In effect in Zenith I, the Supreme Court was stating that there are certain times when per se violations necessarily cause per se the fact of damage to one's business. Indeed, this is such a case. But we do not have to go that far. We proved what plaintiff in Zenith II proved. Thus in Zenith II plaintiff did not have to prove who its customers would be in Canada, contra the Court's (I 235A) requirement here. It is unrefuted that IRCA's capability during the statutory recovery period was higher than the number of banana cars actually transported, thereby proving injury to IRCA's business or property; the extent of that injury of course is reserved for the second phase of the trial.

The Court erred as a matter of law in holding, contra Zenith I, that plaintiff had to show that its customers had the "intention, preparedness and capacity" to ship more bananas than they were actually shipping* (I 360A, 4, I 286A, 93, I 234A-5A). In Zenith I, Zenith did not show who its customers would be in Canada or that its Canadian customers had "the intention, preparedness and capacity" to purchase from Zenith but for the antitrust violations.

Arguendo, here, given the per se violation that worked

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* Arguendo, we showed it as to Standard.

against Standard, it could not have reached its maximum potential in western Guatemala by February 16, 1961, that defendants' antitrust violations "had effectively prevented" (Zenith I, 118-9) the necessary expansion in earlier years to obtain that maximum by February 16, 1961, and that IRCA "therefore suffered damage during the damage period from [Standard's] having a smaller share of the [Guatemala west] market than it would have had if the [antitrust violations] had never existed." In our case, the Guatemala west market, instead of being 6 million stems in 1960, would have been, at least, 9 million stems (the number United gave Chalk (II 399A)), and continued at that level during the recovery period.

In addition, other items of damage such as permanent damage to IRCA, severance pay, IRCA overstaffing, its reduced import traffic from Standard, during the recovery period, are all items of damage that flow also from pre-recovery and recovery period violations by the defendants.

Restriction, foreclosure and suppression of independent banana traffic was an injury to IRCA flowing from violation of §§1 and 2 of the Sherman Act and §7 of the Clayton Act.

2. Injury From United's Antitrust Violations During The Pre-Recovery Period Under Zenith II. Furthermore, the rule of Zenith II may also be considered in this connection with respect to the pre-recovery period conduct as a proximate cause of the damages, from the foreclosure of independent traffic, not occurring until after February 16, 1961.

Defendants' pre-1961 violations were a substantial

contributing cause of Standard's abandonment of its plantations in 1961 in that but for the said violations Standard would have had a production capacity in western Guatemala of approximately 5,000,000 stems and the 1961 hurricane by itself would not have caused Standard to leave western Guatemala, just as it did not cause United to leave in 1961.

The nature and extent of the future damage is, however, necessarily speculative until the event occurs; in this case, the year and the failure of shipments to materialize.

It was IRCA's rates and practices in the pre-recovery and recovery periods plus the fact that United continued to hold its stock interest in IRCA until after Standard's 1961 abandonment which precluded Standard from becoming a substantially larger shipper of bananas from western Guatemala and prevented it from staying in Guatemala after the 1961 hurricane. The same rationale applies to independents other than Standard.

D. <u>IRCA Has Standing To Sue.</u>

IRCA's standing to sue should be placed in three separate categories:

(1) United's (CAG's) restriction and then elimination of its own shipments over IRCA.

(2) United's foreclosure of shipments by independents over IRCA, and

(3) United's acquisition, holding and use of IRCA's stock in violation of Section 7 of the Clayton Act.

1. United's restriction and then elimination of its own shipments over IRCA pursuant to United's abuse of monopoly position by threatening IRCA that unless it reduced the

Ripley decreed $130 fair rate, it would abandon Tiquisate and when IRCA refused, it did so. That was also a monopolistic or concerted (United-CAG) refusal to deal, boycott, or price squeeze.

In Steiner, supra, cited with approval in Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F2d 1292 at 1297, (C.A.2) there was a threat to withhold first run motion pictures from plaintiff landlord unless he agreed to reduce the rent and grant certain options, to which threat plaintiff then capitulated. Held: there was standing. Likewise, in our case United, the monopolist, threatened IRCA with abandonment of Tiquisate unless IRCA reduced the $130 line haul rate to $90. IRCA refused and United abandoned Tiquisate. Our case is a fortiori. Accord: Simpson, supra, (defendant terminated its arrangement with plaintiff when he refused to comply with its resale price maintenance policy) Mandeville, supra, (defendant sugar refiners put a price squeeze on plaintiff sugar beet sellers) Ansul Co., supra, Warner & Co., supra, Vines v. General Outdoor Advertising Co., Inc., 171 F2d 487 (C.A.2, L. Hand, J.), Osborn v. Sinclair Refining Co., 324 F2d 566 (C.A.4), Klor's, supra, (a conspiracy to refuse to sell to Klor's), Continental Ore Co., supra, (boycott of plaintiff by parent and wholly owned subsidiary), and Eastman Kodak Co., supra, (a monopolist refusal to deal - like United's refusal to deal here).

In our case IRCA did business with the defendant and the antitrust claims arise therefrom. Thus, the injury is direct. Moreover, IRCA was aimed at and hit by the defendants. Thus, refusal to deal with IRCA culminating in United-CAG's shut-off

of its own traffic, as part of their illegal restraint and monopolization including boycott of IRCA, gives IRCA standing under the rule of this Circuit. IRCA was the only practicable means of exporting bananas from western Guatemala to the United States in volume. United monopolized and restrained trade in IRCA's service of transporting those export bananas and in that export trade. Clearly, therefore, IRCA was a direct target of United's threat, boycott, coercion, and abuse of monopoly position, with respect to United's diminution and termination of CAG shipments.

2. United restricted, foreclosed and suppressed shipments by independents over IRCA pursuant to the United, CAG and IRCA conspiracy, coerced by United, which conspiracy continued during the recovery period pursuant to the preferences in United under the contracts with IRCA.

In Perma Mufflers v. Intl Parts Corp., 392 U.S. 134, the Supreme Court sustained a §4 action by the plaintiff who had unwillingly complied with the restrictive franchise agreement imposed on it by the defendant; Mr. Justice White, in his concurring opinion, explained the rationale for the decision as follows:

> "When those with market power and leverage persuade, coerce or influence others to co-operate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of §4, since it will deter those most likely to be responsible for organizing forbidden schemes." (145)

This is squarely applicable to the facts of our case and shows

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* In essence the issue of standing in connection with plaintiff's claims under Zenith, contra the Court (I 213A), fall under all three categories above enumerated so that the Zenith question in no way changes the issue.

that a remedy for IRCA furthers the purpose of the antitrust laws and their enforcement. Accord: TWA v. Hughes, supra, Bales, supra. At the heart of any antitrust claim is the concept that the offender has wrongfully exercised or sought to exercise control over the economic and competitive decisions of another business entity; see, for example, U.S. v. Topco Associates, 92 S.Ct. 1126, 1135-6 (1972). Thus IRCA was prevented by United from selling its services to shippers other than United and its subsidiary CAG and thus was denied the freedom to sell its services in a free, competitive market. Further support for plaintiff's position is Standard Oil Co. v. United States, supra, and United States v. Reading Co., supra, in which control of a monopoly by another monopolist presents a dramatic case for permitting the cestui corporation to sue the parent corporation because control of a monopoly railroad to eliminate United's competition is one of the classic devices utilized for foreclosure of competition. Under such circumstances the railroad is one of the targets aimed at by the antitrust wrongdoer. Also see Coniglio v. Highwood Services, Inc., 495 F2d 1286, at 1293, n.13, (C.A. 2, 1974) citing Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 497.

Contra the Court (I 237A), Billy Baxter, Inc. v. Coca Cola Co., 431 F2d 183 (C.A.2) is not applicable here since United did take "steps ... to interfere with" (id 188) IRCA's business.

Thus, by coercing IRCA's rate and service structure which restricted, foreclosed and suppressed independent traffic over IRCA, United in substance induced it to join the conspiracy in restraint of trade and is responsible under §4 for that, as well.

3. United acquired and used IRCA's stock where the probable effect "may be" to unduly restrain competition or to "tend" to create a monopoly.

In Gottesman v. General Motors, supra, this Court held that Du Pont's acquisition of stock control over General Motors violated §7 of the Clayton Act and would give rise to liability under §4 if General Motors "was in fact injured by the prohibited acquisition" (p.961); e.g. by paying excessive prices for its purchases from Du Pont. This holding, too, is squarely in point. IRCA "was in fact injured by the prohibited acquisiton" of its stock by United; in the discriminatory rate structure, by the resulting foreclosure of the independent banana traffic, and by United's restriction and then termination of its own shipments over IRCA pursuant to its abuse of monopoly position, refusal to deal and boycott of IRCA, which was also carried out in concert with CAG. Also see Gulf & Western v. Great Atlantic & Pacific Tea Co., 476 F2d 687 (C.A.2) (vertical acquisition of stock, standing to sue so obvious defendant did not even raise it and this Court assumed it, without discussion).

We submit that the proof shows that IRCA was a target of United's violations and its injury their direct result in each of the three above enumerated categories. Thus it is clear under the authorities that IRCA has standing to sue.

Part Two - Collateral Estoppel Effect of Ripley Findings Of Fact On Antitrust Claims

Point IV

ALL OF PLAINTIFF'S DESIGNATED FINDINGS SHOULD HAVE BEEN RECEIVED IN EVIDENCE FOR PURPOSES OF COLLATERAL ESTOPPEL

A. THE PARTIES AGREED AND THE DISTRICT COURT RULED THAT THE RIPLEY FINDINGS ARE BINDING; THAT RULING WAS THE LAW OF THE CASE; IT WAS PREJUDICIAL TO CHANGE THE GROUND RULES IN MID-STREAM

On defendants' second motion for summary judgment, the Court, re the contract issue, stated:

> "This case is, in a sense, a continuation of the Ripley case in the State Court. Both sides agree that the findings in Ripley are binding upon the parties in this Court." (I 44A)

Inconsistently,* in ruling on plaintiff's designated findings from Ripley on the antitrust phase of the case (I 100A-117A), the District Court only admitted into evidence (I 246A, ftn. 1) certain Ripley findings set out in the appendix (I 122A-145A), and erroneously excluded many (I 115A-7A), some of which are set out in the appendix (I 146A-192A).

B. THE DISTRICT COURT RULED THAT THE RIPLEY FINDINGS HAD A COLLATERAL ESTOPPEL EFFECT AS OF DECEMBER 31, 1960 IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE CONTRACT CLAIM BUT INCONSISTENTLY AND ERRONEOUSLY HELD THE RIPLEY FINDINGS ONLY HAD A COLLATERAL ESTOPPEL EFFECT AS OF DECEMBER 31, 1955 FOR PURPOSES OF PLAINTIFF'S ANTITRUST CLAIMS

* On defendants' motion for summary judgment on the contract issue, the Court allowed (I 46A) critical Ripley finding D101(i), but inconsistently and erroneously disallowed that same finding on the antitrust issue as unnecessary to Ripley (I 115A).

The supplemental judgment was entered in March 1961 in Ripley and included damages for the period ending December 31, 1960 (I 37A, III 1025A) and it was on that basis that the Court gave collateral estoppel effect to the Ripley findings re contract as of December 31, 1960 (I 44A, 37A); inconsistently, on the antitrust claims it gave collateral estoppel effect only as of December 31, 1955 (I 112A, 117A).

The Court of Appeals in Ripley, supra, at 447, held that the rights, relationship of the parties and damages were fixed as of the date of the judgment of the trial court, January 2, 1958; it only spoke to the original and amended judgment. The supplemental judgment was entered on March 1, 1961 (III 1025A), after the decision by the New York Court of Appeals; it fixed damages for the period up through December 31, 1960. United paid the supplemental judgment and thus accepted the findings of fact in Ripley as continuing down to December 31, 1960 in all respects. For all purposes the Ripley findings should speak as of the same date, namely, December 31, 1960.

C. THE AUTHORITIES ON COLLATERAL ESTOPPEL SUPPORT PLAINTIFF

In Talcott v. Allahabad Bank, 444 F2d 451, 458-9, (C.A.5), the Court of Appeals set forth the traditional requirements for application of the doctrine of collateral estoppel as follows: (i) identical fact issue, (ii) issue must have been actually litigated and (iii) issue in prior action must have been necessary to the judgment. The Court also ruled that collateral estoppel is not avoided because of different legal theories in the two actions (459).

The Ripley findings relied upon by plaintiff were

necessary to the resulting Ripley judgment, and "it was forseeable that the fact would be of importance in possible future litigation." (United States v. Kramer, 289 F2d 909 (C.A.2, 1961)). In Halpern v. Schwartz, 426 F2d 102 (C.A.2, 1970), this Court defined "necessary" by stating "the prior judgment will not foreclose reconsideration of the same issue if that issue was not necessary to the rendering of the prior judgment, and hence incidental, collateral or immaterial to that judgment." Since the United States Government, during the Ripley trial, brought its antitrust suit against United, basing its claim in part on the same facts upon which plaintiffs relied in Ripley, it was forseeable that the finding of facts in Ripley would be important in pending or future antitrust litigation. Concededly the fact issues were "really disputed" in Ripley and "the loser will have put out its best efforts" (Evergreen v. Nunan, 141 F2d 927, 929 (C.A.2, 1944).

In an affidavit by United's counsel,* Porter R. Chandler, Esq., in support of United's first motion for summary judgment in this case, the following excerpts of pertinent statements were made about the Ripley case (Doc. No.12):

> "transactions ... were exhaustively investigated and formed the basis of the judgment against defendant in the Ripley case. ... covered the relationships between defendant and plaintiff from 1904 to 1961. * * * the trial and record in the Ripley case were of prodigious size; indeed one of the judges ... informed me that he believed the record ... was the longest the court ever had ... * * * In fact the antitrust argument of the present plaintiff International Railways was from the beginning inextricably interwoven into the Ripley case."

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* Porter R. Chandler, Esq. is a member of the firm of Davis Polk & Wardwell, former counsel to defendants in this case, and attorneys for defendant United in Ripley; United defended to the hilt in Ripley with one of the most able law firms in the country as its counsel.

On the question of foreseeability, one of the offenses charged in the complaint by the United States of America against the United Fruit Co., filed on July 2, 1954 was:

> "Almost from its inception, United has exercised a policy of ownership or control of all or a major portion of the railroad facilities in the banana producing areas of the countries of Central and South America except Ecuador. As a consequence, other importers have been denied, or hampered in obtaining, access to these facilities and consequently to the market in the United States, and thus the operations of competing banana shippers in these areas have been greatly curtailed or eliminated."

This necessarily included control over IRCA.

Plaintiff's alternative position is to the extent the Court refused to give collateral estoppel effect to any Ripley finding, then the Court erred in refusing to admit in evidence the documents and testimony that were cited in the Ripley case by the plaintiff in support of such findings (I 113A), since (i) documents admissible in a state court are admissible in federal court; and (ii) defendant United had the right to cross examine the witnesses* in Ripley. The Court also erred in denying plaintiff a further evidentiary hearing after its ruling on collateral estoppel (119A-121A); see Document No.158.

PART THREE - THE CONTRACT CLAIMS

Point V

DEFENDANTS WERE BOUND TO IRCA, CONTRACTUALLY AND BY THE RIPLEY DECREE, NOT TO DELIBERATELY CUT DOWN OR ELIMINATE THEIR AGRICOLA BANANA TRANSPORTATION REQUIREMENTS BEFORE 1968 - ACTIONS WHICH THEY INDISPUTABLY AND CONCEDEDLY TOOK - IN BREACH OF CONTRACT.

* That it is just and equitable to use the Ripley findings is also indicated by the facts that most of the Ripley witnesses are either dead or unavailable and that a substantial number of United's documents were destroyed in a warehouse fire in 1947.

Plaintiff claims that the 1948 agreements imposed on defendants an obligation, which they breached, to ship bananas over IRCA until January 1, 1968. In 1948, the parties agreed in the trackage agreement (II 663A, ¶4)

> "This agreement is made at a time of great development in the banana transportation business on the West Coast of Guatemala and shall extend until January 1, 1968, in furtherance of the desire of both parties to put this matter of banana transportation on the West Coast on a satisfactory basis for each of them for a period of years."

In 1948 Agricola shipped 25,632 carloads of bananas, via IRCA, from the Tiquisate area to Puerto Barrios (I 255A, 6). IRCA was forewarned to be ready to carry "a large amount of banana traffic destined for Puerto Barrios" which in fact then existed. The agreement was "to put this matter of banana transportation on the West Coast on a satisfactory basis for each of them" through December 31, 1967.

Given IRCA's heavy obligation to furnish transportation for this special traffic, under settled principles of contract interpretation Agricola had a reciprocal obligation to ship: "an express promise to either buy or sell need not be set out in the instrument; the one obligation can be implied from the other ... It is generally held that where the article or product is one which the buyer requires for use as distinct from speculation or resale that there is an obligation both to buy and sell." Berlin & Jones Co. v. Monroe Paper Box Co.; 137 NYS2d 155, 156 (Sup. Ct., Steuer, J.) aff'd. w.o. op. 285 App. Div. 926 (1st Dept.). Since that is settled law as to parties dealing at arm's length (Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 90-1, Wigand v. Bachmann-Bechtel Brewing Co., 222 N.Y. 272, 278, 407 E. 61st. Garage v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 280), it is a fortiori so for United, the fiduciary controlling

and dominating IRCA and exacting such a heavy obligation to "sell" from its cestui that United have the corresponding obligation to "buy". Since IRCA was obligated to take care of this special, heavy traffic, that put the matter of banana transportation from the Tiquisate area on a basis satisfactory to United. Obviously, it could also only be on a basis satisfactory to IRCA if it could count on a reciprocal contractual obligation; that it was recited to be satisfactory could only mean that the fiduciary had assumed the reciprocal obligation.

The relationship between that requirements contract, to subsist to the beginning of 1968, and the agreement "relating to construction of port on Pacific Coast" (II 674A), in which Agricola agreed not to build such port until January 1, 1963 and to use the main line of IRCA, exclusively, is evident. For 15 years, to the end of 1962, United agreed not to commence construction of a port* on the Pacific Coast. This meant that all of the Agricola shipments would have to go via IRCA to Barrios on the Atlantic side for that 15-year period. Suppose it decided to build such a port at the end of that period; while the port was under construction, Agricola would have the same requirements and would have the use of IRCA under contract. After the completion of the port, United would still want to ship part of its traffic over IRCA to Barrios, which was closer than a Pacific port could be to much of the U.S. east and gulf coast market; again, it would have the use of IRCA under contract. Suppose, as in fact occurred, construction of a pacific port was not commenced by the end of the prohibited period; then, United had the use of IRCA under contract for all its required shipments from the Tiquisate area to Barrios, for five years more; <u>viz.</u>

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* The port contract was merely a part of the other surrounding contracts (II 661A-674A) and must be read together.

until the end of 1967.

In short, the situation contemplated by the three 1948 contracts was that United had the right to, and the reciprocal duty under, a requirements contract for a 20-year period, subject to the hypothetical option which was never exercised, that it could also ship via its own Pacific Coast port during the last five years of the term if it built such a port in those last five years.

They hypothetical option was, of course, immaterial, since the whole idea of a Pacific Coast port was a sham, as found by the Appellate Division in Ripley, 8 AD2d, at 319. With the port disregarded as sham, what we have is a straightforward 20-year requirements contract; and IRCA and United each had the reciprocal rights and obligations of a requirements contract for that period, expiring January 1, 1968.

Referee Hammer in Ripley found that one of the considerations for the long haul rate was "the assurance of a stable and substantial traffic volume" (Doc. No.74, p.194). He concluded by holding that the rate he fixed would apply "until the termination dates of the present contracts between IRCA and U.F. Co." (id., p.228); viz. December 31, 1967.

IRCA was required, until December 31, 1967, to handle the special Agricola banana traffic and, correspondingly, Agricola was under obligation not to deliberately cut down on its shipments via IRCA during that period. Yet that is just what it did do. The Court held defendants had an absolute right to do what they did; namely, shift production and purchases from western Guatemala to areas not served by IRCA. Under Wigand and Savoy, supra, defendants

clearly had no right by their own conduct to dissipate the Agricola banana transportation requirements; i.e. by depressing and then terminating Agricola operations before January 1, 1968. Our case is a fortiori in light of the fiduciary-cestui relation between United and IRCA.*

The Ripley courts said they were required by equity to survey the over-all picture "including the vista of future operations between the companies." (8 AD2d, at 325-6); they were thinking in terms of quid-pro-quo: since IRCA has an assurance of stable volume to 1968, the fair rate to be prescribed in fixing damages in the judgment was less than it would otherwise have been. That assurance was also incorporated into the Ripley judgment as a judicially binding decree; namely, not to cut or eliminate that volume by its own voluntary actions disabling it from performing. Since United cut and then eliminated its volume from the west coast of Guatemala, it violated both its contract with IRCA and the Ripley judgment. The Court having found on the antitrust claims that "volume of shipments" was one of the grounds of the discount in Ripley (I 291A, 116), and the defendants having accepted the benefit of the discount predicated on the contemplated heavy shipments, they are estopped from asserting any right to cancel those contemplated heavy shipments through December 31, 1967.

Contra the Court (I 48A), since the operation of trains and trackage contracts were in existence until January 1, 1968 (II 661A-8A), then CAG did abandon the Tiquisate plantations while those contracts were still operative and cases like Wigand, supra, and 407 E. 61st St. Garage, supra, are thus clearly in point.

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* Brietel, J., then sitting in the Appellate Division, stated during the oral argument on the merits in Ripley, that the contracts gave IRCA "a virtual guaranteed business" (Tr. of oral arg. in App. Div., page 174).

In Ripley the issue litigated was breach of fiduciary obligation for unjust enrichment, not breach of contract. The law in New York state is clear that where there are two separate and distinct causes of action, and only one is brought, then the other is not barred on grounds of splitting. Contra the Court (I 46A) Ritchie v. Landau, 475 F2d 151 (C.A.2) supports plaintiff. Where the second action is based upon a different theory (here breach of contract) from that asserted in the first cause of action (Ripley, breach of fiduciary obligation and unjust enrichment) then only such matters as were actually litigated and necessarily determined in the prior action are barred, Smith v. Kirkpatrick, 305 N.Y. 66; Schwarz v. American Factors, 265 N.Y. 239; Young v. Farwell, 165 N.Y. 341. Contra the Court (I 46A), the Ripley stockholder plaintiffs suing in Ripley are different than IRCA, here; see IRCA v.U.F., supra (C.A.2) (I 14A, 16A).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED AND IRCA HELD TO BE ENTITLED TO RECOVERY AGAINST UNITED AND CAG; THE MATTER TO BE REMANDED TO DETERMINE THE AMOUNT OF THE RECOVERY.

Respectfully submitted,

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APPENDIX A

BANANAS IMPORTED INTO THE UNITED STATES
AND CANADA FROM THE WEST COAST OF GUATEMALA
THROUGH U.S. PORTS***

Year	Stems (thousands) United	% by United	Competitors	Total
1954	3,000	76.2%	937	3,937
1955	2,837	78.4	780	3,617
1956	2,628	81.3	603	3,231
1957	1,593	64.1	892	2,485
1958	2,397	73.9	845	3,242
1959	2,416	67.1	1,187	3,603
1960	3,402	67.2	1,660	5,062
1961	2,237	67.6	1,071*	3,308
1962	335	99.7	1	336
1963	111	99.1	1	112
1964	8**	100.	-0-	8

(II 727A, 806A-7A, 826A, 908A)

* Standard terminated its shipments in November 1961.

** CAG made its last shipments in July, 1964 (II 469A)

*** All imports for the U.S. and Canada come through U.S. ports (TR 1737-8); the Company's records were kept on the basis of the U.S. and Canada as one total market (TR 1914).

APPENDIX B

UNITED'S (CAG'S) SHIPMENTS FROM WESTERN GUATEMALA
VIA IRCA TO BARRIOS TO U.S.& EUROPE

Year	Stems	Cars*	Rate per Car**
1948		25,632	$75
1949		14,593	75
1950		21,301	75
1951		12,440	75-85
1952		4,534	85-90
1953		16,079	84.99 - 85.77
1954	4,676,255	14,710	84.61 - 85.77
1955	3,986,805	12,988	84.61 - 86.54
1956	4,390,722	14,191	86.92 - 90.00
1957	3,918,800	14,435	90.00 - 93.46
1958	3,293,564	13,230	87.69 - 93.08
1959	3,676,645	13,799	85.00 - 86.92
1960	4,623,468	17,559	84.61 - 85.38
1961	3,481,128	13,693	130.00
1962	2,068,670	7,305	130.00
1963	2,709,004	9,177	130.00
1964 (7mos.)	1,835,386		

(II 807A, PX 1557)

* I 255A-6A for the period 1948-1963; the year 1964 has been adjusted by adding shipments through July 31, 1964.

** For the period 1948-1953, PX 1364.

STANDARD FRUIT'S SHIPMENTS OVER IRCA TO BARRIOS
AT THE FOLLOWING LINE HAUL RATES

Year	Stems	Cars	Rate Per Car
1954	924,520	2,947	$130.00
1955	776,274	2,692	130.00
1956	604,731	2,344	130.00
1957	896,354	3,643	130.00
1958	874,754	3,405	130.54
1959	1,196,778	4,665	133.30
1960	1,646,993	6,896	134.37
1961	1,059,620	4,384	135.79

(II 806A)

APPENDIX C

UNITED'S SHIPMENTS FROM EASTERN GUATEMALA VIA IRCA
(thousands)

Year	Stems to the U.S. Only*	Total Stems to U.S. and Europe (III 1257A)
1954	75	
1955	207	
1956	344	
1957	162	200
1958	291	500
1959	473	600
1960	536	1,100
1961	844	1,500
1962	827	2,100
1963	1,151	2,000
1964	N.A.**	1,900
1965	N.A.	1,600
1966	N.A.	3,000
1967	N.A.	3,600
1968	N.A.	4,900
1969	N.A.	6,300

* (II 727A, PX 1396, p.3)

** N.A. - not available

APPENDIX D

UNITED'S SHARE OF BANANAS IMPORTED THROUGH PORTS OF THE UNITED STATES FROM CENTRAL AMERICA*

	Millions of Pounds			
Year	United	% of Total	Competitive	Total
1954	1,707	78**	490	2,197
1955	1,582	79	410	1,992
1956	1,670	82	361	2,031
1957	1,567	76	487	2,054
1958	1,604	77	475	2,079
1959	1,378	75	471	1,849
1960	1,512	76	465	1,977
1961	1,510	73	566	2,076
1962	1,369	71	549	1,918
1963	1,329	70	565	1,894
1964		71		
1965	1,673	76***	527	2,200
1966	1,992	76	615	2,607
1967	2,061	75	685	2,746
1968	2,084	68	992	3,076

* All countries excluding Ecuador.

** For the period 1954-1963 (II 416A), for the year 1964 (II 814A) - the period 1954-1963 covers imports to United States and Canada but United refers to that as the United States market (II 814A); in any event if an adjustment is to be made to eliminate Canada, then approximately 1.8% should be deducted from United's share for the period 1954-1963.

*** For the period 1965-1968, deducted pounds of imports from Ecuador to the United States (stems in III 1256A times pounds per stems) from total United States imports (on III 939A-40A) and the remainder is total United States imports from Central America and then determined United's share of Central America imports by using United's imports to the United States only (from III 939A-40A) which is equivalent to United's imports from Central America for the period 1966 to 1968 since United did not import from Ecuador in that period (III 1331A) and for the year 1965 adjusted United imports to the U.S. by deducting its imports from Ecuador for that year (III 1331A) after conversion to pounds (III 1256A).

APPENDIX E

Bananas Imported Through United States Ports
For the United States and Canadian Markets
From Central America

(Stems - Thousands)

Year	United Fruit	Standard	Others
1959	23,323	5,914	3,284
1960	24,407	6,598	1,792
1961	24,110	7,775	1,797
1962	19,347	8,024	934
1963	19,819	7,432	1,537

(II 727A)

APPENDIX F

CENTRAL AMERICA'S SHARE OF BANANAS IMPORTED INTO THE UNITED STATES*

Year	Percent
1960	55%
1961	61
1962	55
1963	52
1964	54
1965	63
1966	70
1967	73
1968	80

* For the period 1960-1961, deducted Ecuador imports to the United States (III 1256A) from total U.S. imports (III 939A) and remainder is U.S. imports from Central America and then determined Central America's share of total U.S. imports (III 939A). For the period 1962-1968, deducted pounds of imports from Ecuador to the United States (stems in III 1256A times pounds per stems) from total United States imports (on III 939A-40A) and the remainder is total United States imports from Central America and then determined Central America's share of total United States imports (from III 939A-40A).

APPENDIX G

United's Share of the United State Market*
(based on sales by weight) was as follows:

1935	-	62.1%
1936	-	60.3
1940	-	73.2
1945	-	63.1
1950	-	70.3
1951	-	68.6
1952	-	63.7
1953	-	66.6
1954	-	65.8
1955	-	63.1
1956	-	63.2
1957	-	58.2
1958	-	59.0
1959	-	55.7
1960	-	56.8
1961	-	57.0
1962	-	55.0
1963	-	48.1
1964	-	42.0
1965	-	48.5
1966	-	53.6
1967	-	55.0
1968	-	54.1

* See explanation next page

APPENDIX H

Formula Utilized in Adjusting Combined United States and Canada Statistics To United States Only

The percentages for the years 1935 through 1959 are derived from II 817A; those for the years 1961 and 1962 are derived from the Comptroller's statement on p.2 of PX 698. We have adjusted United's share of the United States (1963) and Canadian market (II 725A) by subtracting 1.8% from the Company's share on that exhibit; the 1.8% was the highest difference in each year 1950 to 1959 between United's share of the United States market (II 817A) and United's share of the United States and Canadian market (see below) if II 725A had been adjusted for the years 1961 and 1962, United's share of the U.S. market would have been 55.4% and 53%, respectively; for 1964 - 1968 (III 939A-940A).

United's Share of Market

Year	U.S. Only By Weight II 817A	U.S. & Canada By Weight II 725A	Plus Diff.
1950	70.3%	71.8%	1.5%
1951	68.6	69.6	1.0
1952	63.7	65.1	1.4
1953	66.6	68.4	1.8
1954	65.8	66.9	1.1
1955	63.1	64.4	1.3
1956	63.2	64.7	1.5
1957	58.2	59.9	1.7
1958	59.0	60.6	1.6
1959	55.7	57.3	1.6

APPENDIX I

UNITED'S BANANA SALES IN THE UNITED STATES

Year	Weight - lbs. (thousands)	Stems (thousands)	Sales (thousands)
1955	2,038,000	25,872	$151,490.
1956	2,122,000	26,365	150,198.
1957	2,020,000	24,904	143,479.
1958	1,985,000	25,496	136,566.
1959	1,942,000	26,972	128,828.
1960	2,246,000	28,850	118,460.
1961	2,094,000	27,003	118,362.
1962	1,839,000	22,902	120,813.
1963	1,604,000	21,985	112,540.
1964	1,442,000	21,610	113,650.
1965	1,697,000		

(PX 1536; 1963-4 weight basis is a combination of stem and box total; 1963-4 stem basis is the stem equivalent of boxes and stems).

APPENDIX J

Competitive Imports to U.S. and Canada**
(thousands stems)

Year	Total*	From Ecuador	% From Ecuador	From Guatemala	From Honduras
1959	24,128.6	14,930.1	62%	1,187.7	4,515.0
1960	24,450.5	16,061.1	66	1,659.8	4,220.4
1961	23,882.3	14,309.6	60	1,071.4	5,312.1
1962	24,167.1	15,209.3	63	.9	6,207.7
1963	26,646.3	17,677.3	66	.9	5,447.0
1964	29,400.9	20,644.7	70	---	5,080.1

(II 826A, 846A-7A)

Competitive Imports (U.S. and Canada)**
By Sections
(thousands stems)

Year	Western	Eastern	Southern
1959	3.5	8,127.7	15,997.4
1960	475.5	9,103.6	14,871.4
1961	1,775.1	7,973.3	14,133.9
1962	1,913.6	7,871.1	14,382.4
1963	2,111.9	8,334.1	16,200.3
1964	2,080.2	9,895.4	17,425.3

(II 826A-7A, 832A-3A, 846A-7A)

* Difference between "Total" and amount shown from Ecuador, Guatemala and Honduras in each year is from all other countries.

** Since Canada constituted about 11% of United's combined U.S. and Canada imports (TR 1803) an 11% adjustment should be made to U.S. and Canada competitive imports to obtain U.S. competitive imports.

APPENDIX K

Bananas Imported Into The United States and
Canada By Standard Fruit
stems (thousand)

Year	Total	Ceiba (Honduras)	Guatemala	Ecuador	Costa Rica-East
1959	10,047.2	4,515.0	1,162.3	4,132.6	237.3
1960	9,725.0	4,220.4	1,641.4	3,126.1*	737.1
1961	10,484.7	5,312.1	979.7	2,709.6*	1,483.3
1962	8,023.4	6,207.7	---	---*	1,815.7
1963	12,215.6	5,447.0	---	4,773.2*	1,985.3
1964	14,859.4	5,080.1	---	7,131.3	2,648.0

(II 846A-7A, 825A-6A)

Bananas Imported Into The United States and
Canada By Standard Fruit From Central America w/o Guatemala

Year	Total Central America without Guatemala	Ceiba (Honduras)	Costa Rica East
1959	4,752	4,515	237
1960	4,957	4,220	737
1961	6,795	5,312	1,483
1962	8,024	6,208	1,816
1963	7,432	5,447	1,985
1964	7,728	5,080	2,648

(II 846A-7A, 825A-6A)

* Standard in addition jointly imported from Ecuador 1,040,100 stems with Ecuadorian Fruit Import Co. in 1960; 1,989,800 stems in 1961; 5,277,700 stems in 1962 (not available for Standard alone in 1962); 826,800 stems in 1962. In 1962, Standard also imported 10,100 stems from the Dominican Republic.

APPENDIX L

STEM EQUIVALENT OF IMPORTS TO U.S.
(millions)

Year	Total Imports U.F. III 1330A	U.F. Imports From C.A.*	Ecuador U.F. Arrivals III 1331A	Total Imports From Ecuador III 1256A	Ecuador Indep. Only
1955	25.9	21.1	4.8	16.6	11.8
1956	26.4	22.6	3.8	16.2	12.4
1957	24.9	20.9	4.0	16.7	12.7
1958	25.5	22.4	3.1	16.2	13.1
1959	27.0	20.5	6.5	22.9	16.4
1960	29.3	21.9	7.4	25.4	18.0
1961	27.5	21.4	6.1	21.2	15.1
1962	23.2	17.0	6.2	23.6	17.4
1963	22.0	17.3	4.7	25.6	20.9
1964	21.6	19.5	2.1	24.1	22.
1965	23.9	23.6	.3	19.8	19.5
1966	28.8	28.8		17.0	17.0
1967	29.2	29.2		15.3	15.3
1968	31.2	31.2		11.9	11.9
1969				10.0	10.
1970				10.9	10.9
1971				9.7	9.7
1972				9.8	9.8

* Central America

APPENDIX M

1963 PROJECTIONS FOR UNITED'S LANDED COST AT UNITED STATES GULF PORTS, BOXED, WITH NEW PLANTINGS IN VALERY*

	Guat. West.	Ecuador	Golfito	Guat. East	Honduras	Armuelles	Bocas
1965 Trop.Cost**	$1.98	$2.01	$1.76	$2.04	$2.26	$1.73	$1.83
ocean freight***	.35	.83	.58	.35	.35	.58	.42
	$2.33	$2.84	$2.34	$2.39	$2.61	$2.31	$2.25
1966 Trop.Cost	$1.95	---	$1.77	$1.95	$2.07	$1.73	$1.68
ocean freight	.35	---	.58	.35	.35	.58	.42
	$2.30		$2.35	$2.30	$2.42	$2.31	$2.10
1967 Trop.Cost	$1.85	---	$1.74	$1.80	$2.06	$1.68	$1.64
ocean freight	.35	---	.58	.35	.35	.58	.42
	$2.23	---	$2.32	$2.15	$2.41	$2.26	$2.06
1968 Trop.Cost	$1.83	---	$1.73	$1.74	$2.06	$1.64	$1.64
ocean freight	.35	---	.58	.35	.35	.58	.42
	$2.18	---	$2.31	$2.09	$2.41	$2.22	$2.06

* Since terminal and transportation, selling expense, and headquarters and corporate expense are constants and doe not vary from one division to another division (II 716A-7A), the variable other than tropical costs, is ocean freight, which when added to tropical cost gives the total variable cost for each division at ports of importation.

** Tropical cost for Guatemala West/- from II 753A for Guatemala East - from PX 760 and III 1383A; tropical cost for all other divisions from II 704A (1963 Forecast).

*** Ocean freight (cost basis) from II 716A-7A.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 1975 the undersigned caused two copies of this brief for plaintiff-appellant to be delivered to Kaye, Scholer, Fierman, Hays & Handler, attorneys for defendants-appellees, at their offices at 425 Park Avenue, New York, N.Y.

Dated: July 16, 1975

Sidney Bender